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CHARLES ELMORE CROPL

No. 837

In the Supreme Court of the United States

October Term, 1936

Chas. C. Steward Machine Company, petitioner
v.
Harwell G. Davis, Individually and as Collector of Internal Revenue for the District of Alabama, respondent

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 837

CHAS. C. STEWARD MACHINE COMPANY, PETITIONER
v.
HARWELL G. DAVIS, INDIVIDUALLY AND AS COLLECTOR
OF INTERNAL REVENUE FOR THE DISTRICT OF ALABAMA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 27–33) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on March 20, 1937 (R. 33). The petition for a writ of certiorari was filed on March 26, 1936 (R. 34), and was granted on March 29, 1937 (R. 34). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the tax imposed by Title IX of the Social Security Act is a valid exercise of the power of Congress under Article I, Section 8, Clause 1 of the Constitution.

2. Whether the tax under Title IX is imposed in violation of the Fifth Amendment.

3. Whether the tax under Title IX is imposed in violation of the Tenth Amendment or the principle that the dual nature of our government must not be impaired.

4. Whether the grants-in-aid to the States authorized under Title III of the Social Security Act are in issue, and, if so, whether they are valid.

STATUTE INVOLVED

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, U. S. C., Supp. II, Title 42, c. 7) is divided into eleven independent titles, many of which might well have been enacted as separate statutes. For the convenience of the Court, the entire Act is set forth in the Appendix, pp. 1–63.

Of the eleven titles only two (Titles VII and XI) are of general application to the entire Act. Title VII provides for the creation of a Social Security Board to perform such functions as may be imposed upon it by other parts of the Act. Title XI consists of general provisions such as certain basic definitions, provision for administrative rules and regulations, a separability clause, a reservation of the right to alter, amend or repeal any provision of the Act, and finally, a section giving the Act its name, the "Social Security Act".

In this proceeding Title IX alone, of the substantive titles, impinges upon petitioner. No other title can possibly be involved unless it be Title III, which authorizes certain appropriations for grants to States. We will later show, however, not only that Title III is not in issue, but that it is in any event a constitutional exercise of power.

TITLE IX

Title IX imposes an annual excise tax upon employers with respect to having individuals in their employ, measured by wages payable with respect to employment during the calendar year. Section 901. The tax begins with the year 1936, and is payable for the first time on January 31, 1937. It is not applicable to certain types of employment including ~~such as~~ agricultural labor, domestic service and other designated categories. Section 907 (c). And the term "employer" is defined to exclude those who do not employ at least eight persons. Section 907 (a). The rate is 1 percent of the total wages payable during the year 1936, 2 percent of those payable during the year 1937, and 3 percent thereafter.

The proceeds of the tax are not earmarked in any way, and are required to be paid into the Treasury of the United States as internal revenue collections. Section 905 (a). Mechanically, as to payment, filing of returns, penalties, and the like, Title IX operates in very much the same manner as any other internal revenue measure. See Section 905.

Pursuant to Section 902, a taxpayer is allowed to credit against the tax (not to exceed 90 percent thereof) the amount of contributions paid by him into an unemployment fund under a *state* law. Such deduction, however, may be taken only with respect to contributions made under state laws certified by the Social Security Board. The Board must make such certification whenever the state law meets certain minimum definitional criteria (Section 903), designed to permit the credit only where the state fund is established under a *bona fide* unemployment compensation measure providing for adequate financial reserves.[1]

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[1] Beginning with the year 1938 a certain "additional" credit is permitted by Section 909. Since the tax for that

One further condition for the allowance of the credit is that the applicable state law require that the contributions to the state fund be immediately paid over to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund". Sections 903 (a) (3), 904. The Secretary of the Treasury is merely the custodian of that fund, exercising no control whatever over a state's administration of its unemployment compensation measure, and the authorized agency of any State may at any time requisition *for any purpose* any or all of the money standing to its credit on the books of the Fund. Sections 904 (f), 903 (a) (4). Further, it is important to observe that the Unemployment Trust Fund consists exclusively of deposits of *state* funds, and does not include any of the taxes collected under Title IX, all of which, as stated above, are paid into the general Treasury as internal revenue collections.

In its basic structure, therefore, Title IX imposes an excise tax upon employers, permitting a deduction not exceeding 90 percent of the tax for amounts paid by the taxpayer to a state unemployment fund.

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year becomes due for the first time on January 31, 1939, it is clear that neither such "additional" credit nor the related provisions in Section 910 can be involved in this case. For the possible convenience of the court, that additional credit is discussed in the Appendix at pages 84–96.

TITLE III

Title III is entitled "Grants to States For Unemployment Compensation Administration." It is not a taxing measure. Under this title there is "authorized to be appropriated"[2] for the fiscal year ended June 30, 1936, the sum of $4,000,000, and for each fiscal year thereafter the sum of $49,000,000, "for the purpose of assisting the States in the administration of their unemployment compensation laws." Section 301. The appropriation is not authorized to be paid out of any particular revenues or funds in the Treasury, nor is there any provision that connects it with the tax in Title IX. Further, the authorized grants are merely to assist the states in the *administration* of their laws, and no part thereof is authorized for use as unemployment compensation. The latter may be made only from non-federal funds.

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[2] Title III, it should be noted, makes no appropriation of any sum; it merely authorizes future appropriations. The authority to appropriate in Section 301 has no legal effect beyond compliance with Rule XXI, Clause 2, Jefferson's Manual and Rules of the House of Representatives. Under that Rule it merely states the maximum that may properly be appropriated; future Congresses may appropriate less, or nothing, if they wish. Actually only $2,250,000 of the $4,000,000 authorized was appropriated for the fiscal year ending June 30, 1936 (Act of February 11, 1936, c. 47, 49 Stat. 1109, 1113), and $29,000,000 of the $49,000,000 authorized for the fiscal year ending June 30, 1937 (Act of June 22, 1936, c. 689, 49 Stat. 1597, 1605).

Section 302 prescribes the method by which payments are to be made to the states. The Social Security Board is required to certify to the Secretary of the Treasury the amount to be disbursed to each State. The Board's determination is required to be based upon the population of the State, the number of persons covered by the state law, an estimate of the cost of proper administration and such other factors as the Board finds relevant.

Section 303 makes certification by the Board subject to certain conditions relating to the proper and efficient administration of state laws, the disposition of the funds granted, and an accounting therefor. These conditions are so worded that they give the Federal Government no assurance other than that the moneys granted by it will not be expended for any purpose other than the one for which they are granted, and will be used in the administration of genuine unemployment compensation laws.

STATEMENT

On March 10, 1937, Chas. C. Steward Machine Company, petitioner herein, filed a petition at law in the United States District Court for the Northern District of Alabama, praying recovery against respondent in the sum of $46.14 (R. 5). On the same day respondent filed a demurrer to the petition (R. 13). The allegations of the petition, as admitted by the demurrer, may be summarized as follows:

The Chas. C. Steward Machine Company is a corporation organized under the laws of Alabama, with its principal place of business at Birmingham, Alabama, and is engaged in the manufacture of coal mining machinery (R. 5). Harwell G. Davis, the respondent, is the Collector of Internal Revenue for the District of Alabama (R. 5).

On March 2, 1937, petitioner paid to the respondent the sum of $46.14, the tax imposed upon petitioner as an employer of eight or more persons by Title IX of the Social Security Act for the period from January 1, 1936, to December 31, 1936 (R. 6). On the same day petitioner filed with the Commissioner of Internal Revenue a claim for refund of the tax (R. 8, 9) alleging that it was unconstitutional for a variety of reasons (R. 10–11). The claim was denied by the ~~petitioner~~ Commissioner on March 9, 1937 (R. 8, 12).

The demurrer to the petition was sustained by the District Court on March 11, 1937 (R. 16). Petition for an appeal was filed and allowed on the same day (R. 17, 20). The case was submitted to the Circuit Court of Appeals for the Fifth Circuit on March 12, 1937 (R. 26). That Court, on March 20, affirmed the judgment and order of the District Court (R. 33).

THE CIRCUMSTANCES WHICH "FURNISH THE OCCASION FOR THE EXERCISE OF POWER" CONFERRED UPON CONGRESS BY ARTICLE I, SECTION 8, CLAUSE 1, OF THE CONSTITUTION *

Before addressing ourselves to the question of the power of Congress to enact the tax under review, we here summarize [3] the circumstances which "furnish the occasion for the exercise of power." These circumstances "do not call into life a power which has never lived," but "afford a reason for the exertion of a living power already enjoyed" [4]—that is, the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." [5]

This taxing statute was enacted because of the drain which unemployment had made, and was likely to make in the future, upon the revenues of the nation.

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*Analytical and research assistance has been furnished by: Robert P. Bingham; Berniece N. Lotwin; Elliott H. Moyer; Peter Seitz; Frank H. Sloss; Morton Stavisky; Prof. Harry Shulman.

[3] In order to abbreviate this part of the brief, we shall so far as possible incorporate by reference tables and citations presented to this Court by the "Economic Brief" for the appellee in No. 49, *W. H. H. Chamberlin, Inc.* v. *Andrews*, Oct. Term, 1936. That brief will hereafter be cited as "N. Y. Brief in No. 49."

[4] *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426.

[5] U. S. Const., Art. I, Sec. 8, Cl. 1.

Experience[6] had shown that unemployment had ceased to be an occasional or local problem, but has become a permanent and widespread characteristic of our industrial economy.[7] Its magnitude in normal, in boom and in depression times is impressive. In the period of great industrial expansion from 1897 to 1926, unemployment in manufacturing, transportation, building and mining averaged more than 10 percent and reached a high level of more than 3 million persons.[8] From 1920 to 1929, when the country was extremely prosperous, the number of unemployed in non-agricultural industries fluctuated between 1,400,000 and more than

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[6] This experience is reviewed in the Report of the President's Committee on Economic Security (1935), 74th Cong., 1st Sess.; Hearings Before the Senate Committee on Finance on S. 1130, 74th Cong., 1st Sess.; Hearings before the House Committee on Ways and Means on H. R. 4120, 74th Cong., 1st Sess.; Senate Rep. No. 628, 74th Cong., 1st Sess.; and House Rep. No. 615, 74th Cong., 1st Sess.

[7] N. Y. Brief in No. 49, pp. 2, 5, 79–94. Report of Pres. Hoover's Committee on *Recent Social Trends;* J. M. Clark, *Economics of Overhead Costs* (1923), p. 360; Webb, S. and B., *English Poor Law History*, Part II, *The Last Hundred Years*, Vol. 2, p. 631; Beveridge, W. H., *Unemployment, A Problem of Industry* (1930), pp. 68, 100–103; Hansen, *Business Cycle Theory*, p. 2; Douglas, Hitchcock and Atkins, *The Worker in Modern Economic Society* (1925), p. 242; Douglas, P. H., *Real Wages in the United States 1897–1926* (1930).

[8] Douglas, P. H., *Real Wages in the United States 1897–1926*, p. 460; Douglas, P. H. and Director, A., *The Problem of Unemployment* (1931), pp. 32, 28; N. Y. Brief in No. 49, p. 15, their table 20, p. 184, and their chart 7, page 15; our table 7, Appendix, page 67.

4 million, and was more than 1,800,000 in 1929.[9] In the period from 1929 to 1936, when the country was passing through a cyclical depression, the unemployed often averaged more than 10 million, and occasionally, according to the most conservative of varying estimates, approximated 16 million.[10] Although these last figures, which show that at times the wage-earners of one-third[11] of our families were directly affected, are abnormal, it is clear from the statistics as a whole that large unemployment in our civilization is a permanent phenomenon,[12] covering all States (often in about the same proportion[13]), reaching at various times into

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[9] Report of Pres. Hoover's Committee on *Recent Social Trends*, Vol. II, p. 478, 498; N. Y. Brief in No. 49, p. 15, their table 21, p. 184.

[10] See Table 20, Appendix, p. 77; International Labour Office, Studies and Reports, Series B (Economic Conditions) No. 20, *Social and Economic Reconstruction in the United States* (1934) Chap. III, pp. 54–55; *International Labour Review*, January 1936, p. 80.

[11] *Social and Economic Reconstruction in the United States, supra*, pp. 54, 55. Compare the statement in the Report of the Committee on Economic Security (Hearings before the House Committee on Ways and Means, 74th Cong., 1st Sess., on H. R. 4120, p. 67) that in 1934 over 19 million persons, or over 15% of the population, were receiving from the national government assistance under the general relief and special programs.

[12] Harry L. Hopkins, Works Progress Administration Administrator, has said that "it is reasonable to expect a probable minimum of 4,000,000 to 5,000,000 unemployed even in future 'prosperity' periods." *The New Republic*, Feb. 10, 1937.

[13] Appendix p. 67, Table 8.

all industries,[14] diminishing the actual productive capacity of the nation,[15] and creating continuous public relief problems.[16]

There is disagreement among experts as to the causes of this large volume of unemployment. The complexity of our modern interdependent economic life, the necessity of a "labor reserve", technological advance, seasonal fluctuations, style changes, shifting markets, and bad judgment are blamed in varying degrees by different experts.[17] But no informed person suggests that in the majority of cases the individual worker loses his job through his personal incapacity or dereliction. The loss comes to him as a disaster over which he has and can have no control.

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[14] The widespread incidence of unemployment is thoroughly discussed in the N. Y. Brief in No. 49, pp. 20–25. See particularly their Table 7, p. 21.

[15] Appendix p. 69, Table 10. The figures in that table show that the people of the nation were, by reason of unemployment, denied goods and services equal to nearly two-fifths of the quantity that they were actually furnished by the gainfully employed.

[16] See N. Y. Brief in No. 49, pp. 28–43.

[17] For varying explanations of the causes of unemployment, see Report of Pres. Hoover's Committee on *Recent Social Trends;* J. M. Clark, *Economics of Overhead Costs* (1929), pp. 366–367; N. Y. Brief in No. 49, pp. 1–3; W. C. Mitchell, *Business Cycles; the problem and its setting* (1927), p. 61; Hansen, *Business Cycle Theory*, p. 2; Douglas, Hitchcock, and Atkins, *The Worker in Modern Economic Society* (1925), p. 242; Beveridge, *Unemployment, a Problem of Industry* (1930), pp. 100–103.

The disaster is not merely a personal misfortune, for when the breadwinner stops earning money his family, and ultimately society, suffer.[18] Very soon the average family of the unemployed must change its habits. First it reduces its standard of living:[19] at once it eliminates luxuries and the purchase of even such necessities as clothing;[20] it withdraws from the group contacts so essential not only to the family's own morale,[21] but also to the functioning of a highly civilized society; then it makes drastic economies in food,[22] even requiring infants and expectant mothers to go without milk or adequate nutrition,[23] and prejudicing the health of every member of the family;[24] soon, as a result of voluntary action or eviction, it moves to a dwelling in a poorer neighborhood, often "doubling up" with another family in a tenement.[25] At the same time, the family is concerned about not increasing its numbers: unemployment discourages new marriages and new births to couples already married.[26] The severe effect of these cumulative restraints is before long reflected in an increase of physical[27] and mental[28] illness which overcrowds hospitals. Moreover, deprived of a normal way of life and a normal satisfaction of their needs, the younger members of the family of the unemployed are likely to become vagrants or criminals.[29]

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[18] Epstein, A., *Insecurity, A Challenge to America* (3d ed., 1936) p. 198.

[19] Goodrich, Carter, *Earnings and standard of living of 1,000 railway employees during the depression* (U. S. Department of Labor, 1934).

[20] U. S. Department of Labor, Women's Bureau, Bulletin No. 108, *The Effect of the Depression on Wage Earners' Families*, p. 20.

[21] N. Y. Brief in No. 49, p. 58.

[22] Hall, Helen, *Case Studies of Unemployment* (1931); U. S. Department of Labor, Women's Bureau, Bulletin No. 108, *The effect of the depression on wage earners' families*, p. 9; N. Y. Brief in No. 49, pp. 49–50, 53.

[23] Lenroot, K., *Children of the Depression*, Social Service Review (June 1935) pp. 219, 212–242; Williams, J. M., *Human Aspects of Unemployment and Relief* (1933) p. 49; Eliot, Martha M., *Some Effects of the Depression on the Nutrition of Children*, printed in Hospital Social Service December 1933.

In addition to promoting these evils, which are not purely personal, but affect the general well-being of society and the manpower of the country, widespread unemployment indirectly saps the whole economic structure. The large total loss of income which accompanies widespread unemployment markedly curtails consumer demand;[30] that curtailment in turn reduces production, since production in a profit-making system is keyed to anticipated sales; and this reduction of production automatically causes increased unemployment. Thus unemployment promotes unemployment and the forces impairing the general welfare constantly augment themselves.

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[24] N. Y. Brief in No. 49, pp. 52–53; Perrott, G. St. J., and Collins, S. D., *Relation of Sickness to Income and Income Change*, Public Health Reports, May 3, 1935, pp. 595–622; Palmer, Carroll E., *Height and Weight of Children of the Depression Poor*, printed in Public Health Reports, Aug. 16, 1935, p. 1106.

[25] N. Y. Brief in No. 49, pp. 50–51; Brandt, L., *An impressionistic View of the Winter of 1930–1931 in New York City* (1932) pp. 9–10.

[26] The decline of the marriage and legitimate birth rate is discussed with appropriate citations in N. Y. Brief in No. 49, pp. 54–55.

[27] *Id.*, p. 52.

[28] *Id.*, pp. 53, 54.

[29] *Id.*, pp. 55–57; U. S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports* (1936) p. 50; National (Wickersham) Commission on Law Observance and Enforcement, Report (No. 13) on the *Causes of Crime* (1931) Vol. 1, p. 312.

Although the intelligent workman undoubtedly foresees the dilemma in which he and his family may be caught, he is almost as powerless to protect himself against unemployment as he is to prevent its occurrence. He and his family seldom receive enough money to provide against the risks of unemployment[31] as well as of sickness,[32] accident and death.[33] A brief reference to statistics will conclusively prove this. In the highly prosperous year 1928 the *average* income of the 46,704,275 *individuals* in the United States who received any income whatsoever was $1,816,[34] a figure undoubtedly higher than it has ever been before or since.[35] And in that year 80 percent of those *individuals*, or

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[30] See authorities cited in footnote 15, page 12, *supra;* N. Y. Brief in No. 49, pp. 44–46, particularly their chart 22, p. 45.

[31] The average worker in the course of his 45 working years will pass through 8 or 10 depressions (Clark, J. M., *Strategic Factors in Business Cycles*, 1934, p. 11) during which employment will fall off from 10 to 30 percent. Douglas, P. H., and Director, A., *The Problem of Unemployment*, 1931, p. 32, and *Social and Economic Reconstruction in the United States*, International Labour Office, Studies and Reports, Series B, No. 20, 1934, pp. 54–55.

[32] Falk, I. S., *Security Against Sickness* (1930) pp. 15–17, estimates that families with incomes ranging from $1,200 to $2,500 have an average charge for medical care of $86, while those with incomes of less than $1,200 expend an average of $49. Of course, the average hardly tells the story, since a

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single disabling illness may at any time involve even the poorest family in an expense higher than the average.

[33] In a study of typographers' families in San Francisco, Miss Peixotto notes: "Exclusive of the money put into their houses, the most characteristic form of investment was an insurance policy carrying a premium of less than $100 a year, with usually no other savings. Forty-eight men, 59 percent of the whole group of 82 families, carried life or accident insurance, or both. The average premium paid fell between $60 and $70 * * *." (Peixotto, Jessica B., *How Workers Spend a Living Wage. A Study of Incomes and Expenditures of Eighty-two Typographers' Families in San Francisco.* Heller Committee for Research in Social Economics of the University of California. Cost of Living Studies, pp. 161–245 in volume including series of studies; p. 183, (1929). Taylor summarized the situation as follows: "Approximately between one-half and two-thirds of the dependent population in the United States in normal times are paying insurance premiums. * * * The average dependent family carries in excess of one thousand dollars of insurance spread over its members. * * * The average weekly premium expenditure for all families was $1.15." (Taylor, Maurice, *Social Cost of Industrial Insurance*, p. 343). Compare Appendix page 69, Table 11, Item 8.

[34] See Appendix page 65, Table 3.

[35] See Appendix pages 68, 75, Table 9, 18. In 1929 the average wage of employees in the manufacturing industry was only about $1,300. Martin, Robt. F., *National Income and Its Elements*, pp. 23, 28, 29. See the even lower figures for Ohio in that year, Appendix page 76, Table 19.

over 37 million persons, received less than $2,000 each.[36] If instead of looking at individuals, we turn to *family* income, we find that in this same year, 1928, 55 percent of all non-farm families received less than $2,000 and 76 percent less than $3,000.[37] Other years show even lower figures.[38] Moreover, low individual incomes imply low family incomes inasmuch as sample studies indicate that the earnings of husbands constitute 89 percent of the average family income,[39] and that in 77 percent of all families the husband or some other one person is the sole provider of family revenue.[40]

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[36] It is, of course, much less significant to know the average income than to know the number of persons in each economic group. The number of persons in each group in 1910 is shown at Appendix page 64, Table 1; in 1918 at Appendix page 64, Table 2; and in 1928 at Appendix page 65, Tables 3 and 4.

[37] See Appendix, page 66, Table 5.

[38] See Appendix, page 66, Table 6. Compare N. Y. Brief in No. 49, p. 47, and authorities there cited. See also *America's Capacity To Produce*, *supra*, pp. 187–205; *National Income in the United States, 1929–1935*, U. S. Dept. of Commerce (1936), pp. 44, 48.

[39] U. S. Bureau of Labor Statistics, Bull. No. 357, *Cost of Living in the United States* (1924) p. 4.

[40] U. S. Bureau of Labor Statistics, *Incomes Received and Rents Paid by Chicago Families*, Feb. 23, 1937, Table 6. For an analysis demonstrating how little the poorer families receive from income supplementing the wages of the principal breadwinner, see Houghteling, L., *The Income and Standard of Living of Unskilled Laborers in Chicago* (1931) pp. 50, 73.

Starting from such a small income, the average worker does not get even the amount necessary in 1929 to support an urban family at a minimum level of health and decency.[41] Skimp as he may, the average worker (as shown by independent sample studies in the North[42] and in the South[43]) often runs into a deficit[44] and even if continuously employed seldom succeeds in saving as much as $50 a year. These savings are frequently consumed in periods of sickness (see footnote 32 on page 15, *supra*) and absence from work and are almost certain to disappear in periods of part-time employment or seasonal unemployment.[45]

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[41] See the minimum budget in 1929 for a self-supporting Chicago family reprinted in the Appendix, p. 69, Table 11. And note the correlation of this budget to years other than 1929 in the Appendix, p. 70, Table 12. Compare the budget of New York families considered in National Industrial Conference Board, *The Cost of Living in New York City, 1926*, p. 114.

[42] See Appendix, pp. 70, 71, Tables 13, 15. Compare U. S. Dept. of Labor, Bureau of Labor Statistics, preliminary mimeographed report on the Urban Study of Consumer Purchases, entitled *Incomes Received and Rents Paid by Chicago Families* (Feb. 23, 1937), p. 1.

[43] See Appendix, p. 71, Table 14. Compare Lenroot, K., *Children of the Depression*, Soc. Serv. Rev., June 1935, pp. 219–222.

[44] In addition to the tables referred to in the two preceding footnotes, see U. S. Department of Labor, *Monthly Labor Review*, Vol. 29, pp. 41–61, for a study of *Cost of Living of Federal Employees in Five Cities;* U. S. Dept. of Labor, Bulletin No. 357, *Cost of Living in the United States*, 1918–1919, pp. 4, 5, 447.

Anything which is left, if it is not lost in bank failures, is completely drained by the worker's needs in periods of cyclical depression. This is proved by the evidence of the last depression: from 1930 to 1934 over 13 million depositors closed their savings accounts, and withdrawals totaled more than 7 billion dollars;[46] in 1932 and 1933, 11,654,000 industrial insurance policies having a face value of $24,109,644,000 were surrendered while 32,-

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[45] A very large part of savings ~~are~~ is consumed in periods of part-time employment and voluntary or involuntary absence from work. It has been estimated that the average worker spends 8 percent of his working life in such periods. Douglas, P. H., *Real Wages in the United States, 1890–1926* (1930) p. 588. If this is correct, then long before the depression, these periods exhaust his savings. In any event, once the depression comes, savings are soon exhausted. By January 1935 over 20 million persons, having exhausted all available assets, were on public relief rolls. Federal Emergency Relief Administration, Release No. 8665, December 1935 (Table I thereof). Probably prior to that date, a large proportion of them ~~were~~ was in debt as a result of small sums they had borrowed either without security or on chattels or assignments of future wages. Robinson, L. N. and Nugent, R., *Regulation of the Small Loan Business* (N. Y. 1935) p. 55; Clark, Evans, *Financing The Consumer* (1930) p. 213.

[46] American Bankers Assn., Savings Bank Division, *Savings Deposits and Depositors in Banks and Trust Companies of the United States for the years 1930 and 1935*, p. 2. See corroborative statement N. Y. Brief, No. 49, p. 48, particularly footnote 37.

410,000 such policies having a face value of $7,554,972,000 were allowed to lapse.[47] By June 1933 workers were losing the equities they had in their homes at the rate of 1,000 houses per day.[48]

If, from the foregoing, it is clear that the average individual worker cannot, by taking heed in advance, protect himself against his future days of unemployment, it is equally clear that once the day has arrived, adequate funds cannot usually be had by resort merely to the resources of the worker's relatives, his employer, private charity, and local governments.

It is well known that relatives of the unemployed worker, usually being in the same economic group as the worker, cannot long carry the burden.[49] Those few private employers who have generously and voluntarily established plans to deal with unemployment rarely make anything like adequate provision, and frequently have found that even the limited schemes which they adopted were beyond their capacity to carry through unaided.[50] Although private charities at all times do much to relieve the unemployed, they cannot, even when their responses are the most magnanimous, even approximate their needs.[51] A dramatic example is furnished by the private Emergency Unemployment Relief Committee in New York City which, through heroic efforts, raised in 1931–1932 almost 20 million dollars, an amount which by 1934 would have carried the city's relief load for scarcely more than a month.[52] At the same time that resort is had to private charities, resort is had to state and local governments. These governments, if they have no contributory or special tax system, exhaust their reserves and their credit in meeting ordinary part time and intermittent unemployment. Thus they enter a cyclical depression unprepared. In such a disaster, lacking a special fund for unemployment, crippled by tax delinquency,[53] facing a resistant bond market,[54] and unable to meet their ordinary expenses,[55] they soon are forced to call upon the national government.

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[47] The Insurance Yearbook of the Spectator Co., New York, N. Y., *Statistical Abstract of the United States* (1935) p. 279.

[48] Federal Home Loan Bank Board, *The Home Owners' Loan Corporation, Its Purposes and Accomplishments, June 13, 1933 to June 13, 1936*, pp. 1, 2, 5.

[49] Givens, M. B., *Statistical Measures of Social Aspects of Unemployment*, in *Journal of American Statistical Association*, September, 1931, p. 311; N. Y. Brief in No. 49, p. 49.

[50] See N. Y. Brief in No. 49, pp. 99–107, and authorities there cited.

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[51] Private charities in cities having over 30,000 population expended, for relief for homeless men and families outside of institutions, $5,819,239 in the first quarter of 1929, and $22,468,161 in the first quarter of 1931. U. S. Department of Commerce, *Relief Expenditures by Governmental and Private Organizations 1929 and 1931* (1932) pp. 6, 8. Although this meant an increase of 286.1 per cent in private philanthropy, the total was never more than two-thirds of what local governments expended, and a mere pittance compared with what the national government ultimately spent for the corresponding periods of time. See Appendix pages 72–73, Table 16. In July 1935 private funds accounted for only 1.1 percent of the total relief expenditures, and in July 1936 the percentage had risen to only 2.7. Social Security Board, *Changes During July 1936 in Different Types of Public and Private Relief in Urban Areas* (October 19, 1936) Table 1 thereof.

[52] N. Y. Brief in No. 49, p. 28, n. 23.

The recent experience of the national government in response to such a call for funds is common knowledge. See *West Coast Hotel Co.* v. *Parrish*, No. 293, October Term, 1936, March 29, 1937. After vainly trying to solve the problem through voluntary private action, such as the share-the-work movement, the national government was forced to use the same taxing and spending power here involved to effectuate a policy which began with loans through the Reconstruction Finance Corporation to private corporations and local governments,[56] and proceeded to include grants to local governments for relief,[57] expenditures for public works,[58] including allied efforts such as the Civilian Conservation Corps;[59] and eventually expenditures for direct relief or work relief.[60] Without measuring precisely the extent to which the national government shared with the States this financial burden of providing for the unemployed, it will be enough to recall that although between January 1, 1933, and July 1, 1936, the States incurred obligations of $689,291,802 for emergency relief, and local subdivisions of government incurred an additional $775,675,366, the national government was forced to incur, for emergency relief alone, more than twice as much, or $2,929,307,125.[61] According to the President's budget message for the fiscal year 1938, the national government's total expenditures for public works and unemployment relief for the three fiscal years 1934, 1935 and 1936 was $8,681,000,000. Thus, mirrored large in the depression, we see the role which the national government must take in our complex industrial civilization to care for the unemployed whose constant presence is a concomitant of that civilization.

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[53] U. S. Department of Commerce, Bureau of the Census, *Current Tax Delinquency* (1934).

[54] Bird, Frederick L., *Municipal Credit in the United States*, included in *Taxation and Public Policy* (Studenski, ed.; 1936) ch. VII; King, Clyde L., *Public Finance*, 1935, p. 549.

[55] Norton, John K., *American Educational Finance*, included in *Taxation and Public Policy* (Studenski, ed.; 1936) ch. VI.

[56] Act of Jan. 22, 1932, c. 8, 47 Stat. 5; Act of July 21, 1932, c. 520, 47 Stat. 709.

[57] Act of May 12, 1933, c. 30, 48 Stat. 55.

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[58] Act of July 21, 1932, c. 520, 47 Stat. 709; Title II of Act of June 16, 1933, c. 90, 48 Stat. 195, 200, and subsequent statutes.

[59] Act of March 31, 1933, c. 17, 48 Stat. 22, and subsequent statutes.

[60] Act of Feb. 15, 1934, c. 13, 48 Stat. 351; Title II of Act of June 19, 1934, c. 648, 48 Stat. 1021, 1055; Act of April 8, 1935, c. 48, 49 Stat. 115; Title II of Act of June 22, 1936, c. 689, 49 Stat. 1597, 1608.

[61] See Appendix, pages 72–75, Tables 16 and 17.

Recognizing the permanency of the unemployment problem, and the inevitability of continual large drains on the federal treasury if no new program were fostered, public authorities considered how best to meet the problem. No informed person supposed that even by foresight and prudence complete financial provision could be made for all unemployment, including that in cyclical depressions.[62] Experts, however, did conclude that the adoption of unemployment compensation systems (that is, systems under which money is regularly contributed to a fund held to pay benefits to workers when they became unemployed) would mitigate the severity of depressions and the drain on the federal treasury in two ways: first, they would prevent that exhaustion of the resources of workers, charities and local governments which now occurs in ordinary periods of occasional unemployment long before any cyclical depression,[63] and second, such systems would prevent the onset, or lessen the destructive effect of, cyclical depressions by making available to meet the emergency a stored-up fund of consumer purchasing power.[64]

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[62] *Report of the President's Committee on Economic Security* (1935) pp. 13–14; S. Rep. No. 628, 74th Cong., 1st Sess., p. 11; H. Rep. No. 615, 74th Cong., 1st Sess., p. 7.

[63] See Lubin, I., *The Absorption of the Unemployed by American Industry* .(1929); Clague, E., Couper, W. J., Bakke, E. W., *After the Shutdown* (1934); and see authorities collated in footnote 45, page 19, *supra.*

[64] See Senate Rep. No. 628, *supra*, p. 12; Slichter, *Towards Stability* (1934), p. 150; Aldrich, Winthrop W., *The Monitor* (publication of Assoc. Industries of N. Y.), August 1936; N. Y. brief in No. 49, pp. 46, 155–156.

Moreover, such systems would be more economical than relief, would improve the organization of the free labor market, would reduce malingering and would improve the morale of the workers.[65] These conclusions of experts corresponded with the judgment of men of affairs[66] and with experience in no less than 18 foreign countries.[67]

The difficulty in adopting them was that each State, although usually sympathetic to proposals for unemployment compensation,[68] hesitated to act individually or without the encouragement of the national government for one or more of the following reasons: (1) the financial burden of the system would, unless paralleled throughout the country, handicap the competitive position of its own industries and would discourage the coming of new industries;[69] (2) it could not afford the necessary technical advice and early administrative costs necessary to establish such a program on a sound footing;[70] (3) if it placed this new burden on its own industries it could not protect them by an embargo on goods coming from States where competitive industries were not covered by unemployment compensation;[71] (4) perhaps it could not, without permission from Congress, include in any unemployment compensation system a tax upon

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[65] N. Y. Brief in No. 49, pp. 120–125.

[66] *Id.*, pp. 141–145.

[67] *Id.*, pp. 170–171, 146–162; Senate Rep. No. 628, *supra*, pp. 10–11.

[68] The large number of unemployment compensation bills introduced into the New York State Legislature between 1921 and 1936 (Ibid, pp. 176–183) is typical of the local interest in inaugurating state unemployment compensation systems. Senate Rep. No. 628, *supra*, p. 11.

[69] The burden of a 3 percent pay roll tax is conservatively estimated in the N. Y. Brief in No. 49, their table 18, p. 135. In some industries, where the labor cost is high, the tax would curtail or eliminate the profits of an enterprise experiencing severe competition, a curtailed market or bad management. Standard Statistics Co., *Standard Trade and Securities Bulletin*, April 6, 1936, p. 249, May 11, 1936, p. 167. Such an effect on profits (judging from recent Federal Trade Commission and National Industrial Re-

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covery Administration reports) might be particularly severe in the cotton textile and coal industries, where the margin of profit in some competitive areas is very low. At any rate, it is obvious that the fear of competition of industries in other States was an important deterrent to the enactment of unemployment compensation laws. Massachusetts Special Commission on Unemployment, *Unemployment Compensation and The Minimum Wage* (1933), p. 45; Clausen, F. H., *For the Enlightenment of Those Who Have not yet Familiarized Themselves with this Dangerous Proposal* (Wisc. Mfrs. Assn., 1921); Mfrs. Assn. of Conn., *Unemployment and Its Problems* (1933) pp. 129–130; Douglas, P. H., *Social Security in the United States* (1936) p. 4; House R. No. 615, 74th Cong., 1st Sess., p. 5; Senate Rep. No. 628, *supra*, p. 11. Gov. E. W. Marland, Proceedings of the 28th Annual Conference of the Nat. Tax Assn. (1935) p. 5; Seligman, E. R. A., lecture on *The Fiscal Outlook and Coordination of Public Revenues*, in *Recent Problems in Public Finance* (1933) p. 272; Groves, H. M., lecture on *Uniformity in State and Local Taxation*, *ibid.*, p. 282. And see the recitals in state unemployment laws showing legislative recognition of the alleged competitive danger. Calif. Laws of 1935, c. 352, Art. I, Sec. 1; Mass. Gen. Laws, c. 151A, Sec. 53, as amended; Idaho Laws of 1936, c. 12, Sec. 26; Miss. Laws of 1936, c. 176, as amended by Act of Sept. 19, 1936, Sec. 2 (b).

[70] House Rep. No. 615; *supra*, p. 9.

[71] *Baldwin* v. *Seelig*, 294 U. S. 511.

employers[72] or employees[73] engaged exclusively in interstate commerce; and (5) it might not be to the narrow self-interest of its own citizens to establish any such system so long as the national government, without collecting any special tax, used its general resources to care for the unemployed within the States' borders.[74]

The situation was one in which action by the national government was urgent. Three principal methods were actually proposed:[75] (1) without imposing any special tax, the national government might transmute the relief system into unemployment compensation, and have the benefits administered either by the nation or by the States operating on a subvention plan; (2) the national government might impose an excise tax and use the proceeds for an unemployment compensation system set up either by the nation or by the States operating on a subvention plan; or (3) the national government might impose an excise tax and, by allowing against it a credit for amounts contributed to a state unemployment compensation system, encourage the establishment of such systems.

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[72] Compare *Ingels* v. *Morf*, No. 439, October Term, 1936, March 1, 1937.

[73] *Robbins* v. *Taxing District of Shelby County*, 120 U. S. 489.

[74] For many States a system of federal relief is probably a better bargain than an unemployment compensation system. Several States contribute less than 5 percent of the relief funds spent within their borders. Appendix, pages 74–75, Table 17. Since their citizens also pay a very small part of the federal internal and external revenue taxes, it is obvious that they are securing a benefit at the expense of citizens elsewhere in the Union.

[75] *Report of the President's Committee on Economic Security*, *supra*, pp. 14, 17.

Congress chose the third and most conservative alternative for reasons of policy and for reasons of law. So far as policy is concerned, it recognized that under the third alternative: (1) each State would be free to determine what, *if any,* system of unemployment compensation it would have; (2) the diversity of state plans would give the country the benefit of experimentation in a new field;[16] (3) local administration would promote efficiency, would encourage local persons to watch income and outgo with vigilance, and would breed responsible local leadership; and (4) a truly "federal" remedy was being applied to a problem which had become the cooperative concern of both parts of our dual government.

So far as law is concerned, Congress relied squarely on the precedent of the Federal Estate Tax, Section 301 of the Revenue Act of 1926, which Congress knew[17] had been upheld in *Florida* v. *Mellon,* 273 U. S. 12. That statute imposes a tax upon the transfer of a decedent's estate, while at the same time permitting a credit, not exceeding 80 percent for "the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory." As we shall show in detail in the argument, the large credit there given not only has had the effect of reducing substantially the Federal revenues, but also has operated to remove the incentive for wealthy persons to move to States having no death taxes, and has induced such States to levy death taxes. That is, that tax, like this tax, effectuates several policies.

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[16] *Report of the President's Committee on Economic Security, supra,* p. 23.

[17] Senate Rep. No. 628, *supra,* p. 12.

SUMMARY OF ARGUMENT

I

Title IX is a valid exercise of the power of Congress "to lay and collect Taxes * * * and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Constitution, Article I, Section 8, Clause 1.

This tax has the indicia of a revenue measure. Being laid upon the privilege of receiving services it is a valid excise, and, under the rule enunciated in *Florida* v. *Mellon,* 273 U. S. 12, it satisfies the constitutional canon of uniformity. It will raise substantial revenue, for even if the maximum available credits are utilized it will yield the Treasury of the United States amounts estimated to range from $22,000,000 to $90,000,000. Even if, in laying the tax, Congress acted with an eye to public policy, this Court will not on that account invalidate the tax. *Sonzinsky* v. *United States,* No. 614, October Term, 1936, March 29, 1937; *Florida* v. *Mellon, supra.*

If the policies of Congress in enacting this tax are to be considered, they bear a reasonable relation to the power granted in Article I, Section 8, Clause 1, since they are concerned only with the raising and spending of money for the general welfare of the United States. One policy is to make financial provision for the unemployed, thus relieving a drain which creates "unparalleled demands for relief" from the federal treasury. *West Coast Hotel Co.* v. *Parrish,* No. 293, October Term, 1936, March 29, 1937. Another policy is to mitigate double taxation. *Florida* v. *Mellon, supra.*

These policies are not only reasonably related to the power conferred by Article I, Section 8, Clause 1, but have been executed in a method specifically sanctioned by this Court. It is already established by decisions that a policy relating to the taxing and spending powers may be executed by a tax and credit. *Florida* v. *Mellon, supra.* Moreover, where the credit is made available only where the financial needs of the national government are met by the States, the tax and credit must be regarded as valid in view of the words of the Constitution, the expressions of the Framers of the Constitution (*Federalist,* Lodge ed., Nos. 36 and 45; *Farrand, Records* of the *Constitutional Convention,* Vol. 3, pp. 99–100), nineteenth century legislative precedent (Act of May 13, 1862, c. 66, 12 Stat. 384) and the plain objective of Article I, Section 8, clause 1.

II

Title IX is consistent with the Fifth Amendment. Since the proceeds are not earmarked in any way, but are commingled in the Treasury of the United States, it is unnecessary to consider the possible challenge that there is a taking of property from one class for the benefit of another.

As a result of the definitions in Section 907, the tax is not applicable in the case of employers of less than eight, agricultural labor, domestic service and other specified types of employment. Those selections, together with the 90 per cent credit and related classifications, constitute the substance of attack under the due process clause. Our answer is two-fold.

First, the Fifth Amendment does not apply to selections and there is grave doubt whether it applies to classifications in a federal taxing statute. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 158. Although the Fifth Amendment may apply where the supposed tax is merely a confiscation of property, this Court has often recognized the broad powers of selection, and has frequently indicated the inapplicability of the Fifth Amendment to classifications. *Flint* v. *Stone Tracy Co., supra; Billings* v. *United States,* 232 U. S. 261, 282.

Second, even if the various selections and classifications are examined under the Fifth Amendment, they will be found reasonable and amply justified by precedent. *Knowlton* v. *Moore,* 178 U. S. 41; *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1. The Section 907 definitions all find counterpart in similar provisions repeatedly approved by this Court. The 90 percent credit not only is founded upon the familiar policy of avoiding double taxation, but is also based upon fiscal considerations of perhaps an even more fundamental character. To the extent that taxpayers make contributions to state unemployment compensation funds, the drain upon the federal treasury for relief funds is diminished. That this fact was uppermost in the mind of Congress in permitting the 90 percent credit is apparent from an examination of the reports of both the Senate Finance Committee and the House Committee on Ways and Means.

The conditions in Section 903 (a) are designed to allow the 90 percent credit only where the state fund to which contributions have been made is a true unemployment compensation measure. Otherwise, if the state statute were merely masquerading as an unemployment compensation law, and had been enacted merely to enable local employers to take advantage of the credit or for some other foreign purpose, the federal fiscal purpose which the 90 percent credit is calculated to serve would be frustrated.

III

A. The Tenth Amendment cannot be considered in connection with the exercise of a granted power.

Ashwander v. *Tennessee Valley Authority,* 297 U. S. 288, 330; *United States* v. *California,* 297 U. S. 175; *Everard's Breweries* v. *Day,* 265 U. S. 545, 548. But if it has any application to an exercise of granted powers it does not apply here.

The tax does not in any sense constitute a penalty. It cannot be avoided by voluntary action, for whether or not the State enacts an unemployment compensation law, the taxpayer pays the same amount. It cannot be contended that the taxpayer will be "penalized" if his State enacts a law which does not meet the standards set forth in Section 903 (a). If the contention is open to petitioner, it is unsound, since federal tax laws may permit deductions which are available to persons in some States and not in others. *Crooks* v. *Harrelson,* 282 U. S. 55; *Brown* v. *Helvering,* 291 U. S. 193, 201; *New York Ins. Co.* v. *Edwards,* 271 U. S. 109. Since the taxpayer is not given the option of escaping the tax by adopting an alternative course of conduct or submitting to regulation, the *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; and *United States* v. *Constantine,* 296 U. S. 287, are not applicable.

Nor does the credit under Section 902 constitute "economic coercion" of the taxpayer. He is offered no inducement which restricts his voluntary choice; at most, the knowledge that the tax is applicable throughout the United States will remove the fear of competition which would otherwise constitute his objection to the enactment of an unemployment compensation law by his own State. The case is thus entirely different from *United States* v. *Butler,* 297 U. S. 1, where the power to confer or withhold benefit payments to the individual farmer amounted to a power to coerce him into accepting a system of regulation of production.

There is, obviously, no attempt by Congress here to regulate directly the relationship of employer and employee since Congress has not established an unemployment compensation system to operate in any State. Consequently, *Carter* v. *Carter Coal Co.,* 298 U. S. 238, and *Schechter Corp.* v. *United States,* 295 U. S. 495, have no application. Nor is Congress attempting an indirect regulation of the relationship of employer and employee. The mere fact that Congress, in the exercise of a federal power, takes into account the existence of local regulatory measures does not transform these measures into national regulations. *Crooks* v. *Harrelson,* 282 U. S. 55; *Florida* v. *Mellon,* 273 U. S. 12; *Poe* v. *Seaborn,* 282 U. S. 101; *Hanover National Bank* v. *Moyses,* 186 U. S. 181; *In re Rahrer,* 140 U. S. 545; *Whitfield* v. *Ohio,* 297 U. S. 431.

B. The tax and credit do not violate the principle of the dual system of our government. That principle has never been applied to denounce action by either the States or the Federal Government by which greater cooperation between them can be secured. *Clark Distilling Co.* v. *Western*

Maryland Ry. Co., 242 U. S, 311, 331; *Whitfield* v. *Ohio*, 297 U. S. 431.

The Act is cooperative rather than coercive, and actually increases the freedom of the States. Prior to the passage of Title IX, a State, by enacting an unemployment compensation law, might seriously have prejudiced its domestic producers. This economic coercion of the commerce clause is effectively eliminated by Title IX. Compare *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, No. 138, October Term 1936, January 4, 1937. Noteworthy evidence of the lack of coercion of the federal statute is to be found in the fact that several States have refused to pass unemployment compensation laws, and in the fact that the highest courts of two States have held that they did not consider their States coerced. *Howes Brothers Co.* v. *Mass. U. C. Comm.*, (Mass. Sup. Jud. Ct., Dec. 30, 1936), 5 N. E. (2d) 720; *Gillum* v. *Johnson* (Calif. Sup. Ct.), 62 P. (2d) 1037.

The conditions contained in Section 903 (a) are merely designed to insure that the credit is allowed only in connection with a genuine unemployment compensation law. Existing State unemployment compensation laws show~~s~~ a marked diversity of systems and provisions and demonstrate clearly that the States are in no way subject to Federal "dictation".

Even if the tax levied by Title IX be considered as a factor which makes it more desirable for a

State to enact an unemployment compensation law, nevertheless its validity is established by decisions of this Court. If there be any inducement, it cannot in any sense be called coercion, which is an inducement to submit to regulation as the price of escaping a crushing burden. A State which does not enact an unemployment compensation law can suffer little, if any, detriment; the tax burden on its citizens remains the same, and the relief of its unemployed will, in all probability, still be undertaken in large part by the Federal Government. The inducement is consequently no greater than that of a grant-in-aid, which this Court has expressly stated to be not coercive in *Massachusetts* v. *Mellon,* 262 U. S. 447. Moreover, since the Federal Government is enabled under its power to appropriate for the general welfare to spend money for the relief of the unemployed, it cannot be said that it has gone beyond its power if it enacts legislation inducing the States to make expenditure for this same purpose.

Finally, Title IX is supported by the direct precedent of the Estate Tax provided in Section 301 of the Revenue Act of 1926 and sustained by this Court in *Florida* v. *Mellon,* 273 U. S. 12. We submit that this decision governs the case at bar.

IV

Title III authorizes an annual appropriation of $49,000,000 "for the purpose of assisting the States in the administration of their unemployment compensation laws." These subventions do not affect the validity of the tax imposed by Title IX.

A. Title III is, in fact, wholly separate from Title IX. The proceeds of the Title IX tax go into the general funds of the Treasury, unearmarked in any way. The subventions are appropriated out of general funds. They may, and have in fact, varied widely from the authorization in Title III, but even if the authorization be taken as a criterion, there is no equivalence between the proceeds of the tax and the appropriation. Indeed, as the tax proceeds *decrease* due to imposition of state taxes which may be credited against the Title IX tax, the payments under Title III, *pari passu,* increase. The case is governed by *Frothingham* v. *Mellon,* 262 U. S. 447.

Moreover, Title IX is, in law, separable from Title III. The facts do not rebut, but strengthen the presumption of separability from the separability clause. Section 1103. Title IX can operate alone, and, assuming that it had a policy of making it possible for the States to enact unemployment compensation laws, can achieve that policy independently of Title III. At most, Title III is merely cumulative. Cf. *Liggett Co.* v. *Lee,* 288 U. S. 517; *Sonzinsky* v. *United States,* No. 614, October Term, 1936, March 29, 1937.

B. In any event, Title III is valid. Certainly the maintenance by the States of unemployment compensation laws will, by some "reasonable possibility" (*United States* v. *Butler,* 297 U. S. 1, 67) conduce to the general welfare. And the form of the present appropriation—subventions to States to pay administrative expenses under state laws—is clearly valid. Grants-in-aid to the States for a variety of purposes have been common since the first Congress, particularly in the last century—a course of legislation which is very persuasive evidence that the practice is valid. *United States* v. *Curtiss-Wright Export Corp.*, No. 98, October Term, 1936, December 21, 1936. The same answer may be given to the contention that the Federal government may not attach conditions designed to insure that the money be spent for the purposes for which it was appropriated. Reasonable conditions of this sort do not amount to regulation. *United States* v. *Butler,* 297 U. S. 1, 73.

Since Congress was empowered to make the grants under Title III it was necessarily empowered to levy a tax to raise the necessary revenue. Assuming that petitioner can establish that the tax under Title IX is related to the subvention under Title III, there is nothing unnatural or improper in relating anticipated revenues to anticipated expenditures. Such a relation is common in England, in the States and in prior acts of Congress, and has been recognized as normal by this Court. *Knights* v. *Jackson,* 260 U. S. 12, 15; *Patton* v. *Brady,* 184 U. S. 608, 620.

Nor does Section 302 (a) of Title III contain any improper delegation of legislative power. The Constitution does not require that Congress specify the details of the expenditure of public money.

The discretionary character of the power of appropriation is borne out not only by the practice in England prior to the Constitution (Stubbs, *Constitutional History,* Vol. II, pp. 523, 565–568; Civil List Act of 1782, 22 Geo. III, c. 82; 27 Geo. III, c. 33), but also by the consistent exercise by Congress of such a power under the Constitution (*e. g.,* Act of August 7, 1789, c. 9, 1 Stat. 53; Act of March 26, 1790, c. 4, 1 Stat. 104; Act of July 31, 1861, c. 28, 12 Stat. 283). In any event, the standards set forth in the challenged section are well within the prior decisions of the Court. *Hampton & Co.* v. *United States,* 276 U. S. 394; *Field* v. *Clark,* 143 U. S. 649, 692.

ARGUMENT

INTRODUCTORY

Reduced to its essentials, Title IX imposes an excise tax upon the receipt of services by an employer, but permits a deduction, not exceeding 90 percent of the tax, for amounts paid by him pursuant to a state unemployment compensation law.

We shall show (1) that the excise is a true "tax" within the power of Congress under Article I, Section 8, Clause 1; (2) that the tax does not violate the "due process" clause of the Fifth Amendment; (3) that, if a power specifically granted to Congress can be limited by the Tenth Amendment or by some analogous doctrine applicable to a dual system of government, there is no ground for invoking such limiting principles here; and (4) that, if it be assumed that the proceeds of this tax are in part used to defray the subventions provided for in Title III, and if it be further assumed that this petitioner may question such subventions, they and this tax are nonetheless valid exercises of congressional power under Article I, Section 8, Clause 1, of the United States Constitution.

I

TITLE IX IS A VALID EXERCISE OF THE POWER CONFERRED ON CONGRESS BY UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 1

Title IX is an exercise of the power of Congress "To lay and collect Taxes * * * and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Constitution, Article I, Section 8, Clause 1.

We shall here show that Title IX lays a true "tax": it has the indicia of a tax, it is laid upon a proper subject for an excise, it is uniform, and it produces revenue. If it is proper, which we submit it is not, to consider the policies that led Congress to enact this statute, we then show that the policies correspond both in purpose and in the method of execution with the letter and the spirit of Article I, Section 8, Clause 1.

Like all revenue measures, this statute originated in the House of Representatives.[19] Hearings were had before the House Committee on Ways and Means and before the Senate Committee on Finance,[79] these being the committees generally charged with the consideration of tax statutes.[80]

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[19] The bill which was finally enacted was introduced in the House of Representatives as H. R. 7260 on April 4, 1935, 74th Cong., 1st Sess.

Title IX on its face as well as in its operation is a true exercise of the taxing power. It imposes an excise tax on the receipt of services or on the privilege of employing individuals. That the subject is a proper one for an excise is indicated by *Sonzinsky* v. *United States,* No. 614, October Term, 1936, March 29, 1937, and the authorities collected in Appendix C. Moreover, it is clear that the excise satisfies the canon of uniformity, inasmuch as "the rule of liability is the same in all parts of the United States."[81]

The amount of the tax is proportioned to the extent that the privilege is utilized. Section 901. The Bureau of Internal Revenue under the direction of the Secretary of the Treasury is charged with the duty of collection. Section 905 (a). The administrative provisions generally found in revenue statutes relating to the filing of returns, refunds, penalties and the like are likewise present here. Section 905. The tax proceeds are paid into the Treasury of the United States as internal-revenue collections. Section 905 (a). Being mingled in the Treasury with other internal-revenue collections, these proceeds, unlike those considered in *United States* v. *Butler*, 297 U. S. 1, 61, are not ear-marked or related in any way to some special purpose, but are subject to any appropriation for the general support of the Government.

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[79] The House hearings (January 21 to February 12, 1935) were held on H. R. 4120, and the Senate hearings (January 22 to February 20, 1935) were held on S. 1130, both bills being predecessors of the bill finally enacted.

[80] Contrast in this respect the Agricultural Adjustment Act, which, although in form a revenue measure, was handled by the respective committees on Agriculture in the House and Senate.

[81] *Florida* v. *Mellon*, 273 U. S. 12, 17; *Poe* v. *Seaborn*, 282 U. S. 101, 117; *Knowlton* v. *Moore*, 178 U. S. 41.

Further, Title IX is so constructed as to produce substantial revenue. From the outset Congress was deeply concerned with anticipated yield. Estimated receipts, without taking into account the 90 percent deduction, range from over $225,000,000 in the first year to over $900,000,000 after the Act has been in operation for a period of years.[32] Thus,

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[32] The Senate Committee on Finance, recommending a tax on employers of *four* or more, estimated the yield as follows (S. Rep. No. 628, 74th Cong., 1st Sess., p. 27):

TABLE XII.—*Revenue estimates* (*from tax on employers of 4 or more under title IX, with no allowance for 90-percent credit*)

Calendar year with respect to which tax is levied	Fiscal year received into Treasury	Estimated receipts	Rate of tax
			Percent
1936	1937	$247,000,000	1
1937	1938	596,000,000	2
1938	1939	826,000,000	3
1939	1940	831,000,000	3
1940	1941	838,000,000	3
1942	1943	849,300,000	3
1945	1946	876,000,000	3
1950	1951	908,000,000	3

NOTE.—The tax levied by title IX is subject to a credit of 90 percent of the amount of such tax for contributions into State unemployment funds. Therefore the minimum amount of even if the maximum credits are available to all taxpayers in all States, the minimum estimated receipts from Title IX would range from at least $22,000,000 to at least $90,000,000.

These receipts pass unrestricted into the Treasury of the United States and are available for the general support of the Government. Even if, by a *tour de force* which ignores the separable nature of the statute, expenditures under Title III are debited entirely to the funds raised by Title IX, there will still remain a substantial balance for other governmental purposes. See Point IV, pp. 122–123, *infra*.

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revenue each year from this tax will be 10 percent of the above amounts. What part of the above estimates, greater than 10 percent of same, will be retained by the Treasury is problematical, being dependent on the number of States enacting unemployment insurance laws, and the rates and coverage thereof.

The House Committee on Ways and Means, recommending a tax on employers of *ten* or more, estimated the yield as follows (H. Rep. No. 615, 74th Cong., 1st Sess., p. 15):

TABLE XI.—*Revenue estimates (from tax on employers of 10 or more under title IX, with no allowance for 90-percent credit)*

Calendar year with respect to which tax is levied	Fiscal year received into Treasury	Estimated receipts	Rate of tax
			Percent
1936	1937	$228,000,000	1
1937	1938	501,000,000	2
1938	1939	786,000,000	3
1939	1940	803,000,000	3
1940	1941	830,000,000	3
1942	1943	846,000,000	3
1945	1946	872,000,000	3
1950	1951	906,000,000	3

NOTE.—The tax levied by title IX is subject to a credit of 90 percent of the amount of such tax for contributions into State unemployment funds. Therefore the minimum amount of revenue each year from this tax will be 10 percent of the above amounts. What part of the above estimates greater than 10 percent of same, will be retained by the Treasury is problematical, being dependent on the number of States enacting unemployment insurance laws, and the rates and coverage thereof.

That Congress was concerned with such anticipated yield to be paid into the general treasury is significant, apart from any other reason that might have induced it to pass this statute. The importance of this fact is strikingly illustrated by *Nigro* v. *United States*, 276 U. S. 332, where the Court had before it the Harrison Narcotic Drug Act which it had previously declared constitutional in *United States* v. *Doremus*, 249 U. S. 86. The Court pointed out (p. 353) that the Act had been amended since the earlier decision, and that under the amended statute there had been realized approximately a million dollars a year. It adverted to the fact that, if there had previously been any doubt as to the Act being a revenue measure, that doubt had been removed by the amendment yielding such substantial revenue. *Ibid.* Certainly, the estimated receipts under Title IX are many times greater than those yields and greatly exceed the amounts realized under various other tax statutes,[33] including Section 2 of the National Firearms Act which yielded to the Treasury only $5,400 in 1934 and $4,400 in 1935. *Sonzinsky* v. *United States*, No. 614, October Term, 1936, March 29, 1937, footnote 1.

But the petitioner suggests that though a levy bears all the earmarks of a tax, and does in fact raise revenue, it is not an exercise of the power vested in Congress by Article I, Section 8, Clause 1, if Congress, in laying the levy, had in mind not merely revenue but also another policy. To this suggestion a host of cases, culminating in *Sonzinsky* v. *United States*, No. 614, October Term, 1936, March 29, 1937, furnish a decisive answer. The true rule, so recently stated, is that:

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[33] The Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1935 (pp. 56–67), and Internal Revenue Collections, Fiscal Year 1936,

> Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. *Veazie Bank* v. *Fenno, supra; McCray* v. *United States, supra,* 56–59; *United States* v. *Doremus, supra,* 93–94; see *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44, 45; cf. *Arizona* v. *California,* 283 U. S. 423, 455; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 210; *Weber* v. *Freed,* 239 U. S. 325, 329–330; *Fletcher* v. *Peck,* 6 Cranch 87, 130. They will not undertake, by collateral

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Preliminary Statement (pp. 26–37) disclose the following collections:

	1935	1936
Adulterated butter	$3,992.55	$4,664.11
Filled cheese	1,003.58	148.40
Oleomargarine	2,048,976.50	2,203,804.01
Mixed flour	4,525.93	5,882.59
Future delivery	3,950,544.00	2,943,542.37
Playing cards	4,351,299.40	4,143,696.44
Matches	6,000,101.30	6,885,311.92
Furs	2,675,731.07	3,321,057.14
Jewelry	2,010,122.98	3,110,604.75
Firearms	2,143,007.67	2,494,574.54
Cameras and lenses	343,387.66	577,925.70
Chewing gum	757,182.50	807,279.40

> inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. *McCray* v. *United States*, *supra;* cf. *Magnano Co.* v. *Hamilton*, *supra*, 45.

Of the cases cited in this quotation, and the others referred to in the margin,[84] *Florida* v. *Mellon* and *United States* v. *Doremus* sufficiently illustrate the principle that the Federal Government may tax with an eye to broad public policy.[85] In the statute considered in the former case, the Congress provided a tax on the transmission of estates, but allowed a deduction up to 80 percent for amounts paid under state death tax laws. This statute, as its legislative history[86] no less than its structure, reveals, was enacted less with an eye to increasing revenue than to encouraging States to impose local estate and succession taxes. In the *Doremus* case Congress laid a tax on persons dealing with opium, but exempted those who, in addition to having registered with federal authorities, *had procured a*

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[84] *Florida* v. *Mellon*, 273 U. S. 12; *Alexander Theatre Ticket Office* v. *United States*, 23 F. (2d) 44 (C. C. A. 2d); *McKenna* v. *Anderson*, 31 F. (2d) 1016 (C. C. A. 2d), certiorari denied, 279 U. S. 869; *Apollo Operating Corp.* v. *Anderson*, 55 F. (2d) 66 (C. C. A. 2d); *United States* v. *Adams*, 11 Fed. Supp. 216 (S. D. Fla.). See also Story, *Commentaries on the Constitution* (5th ed.), Vol. 1, § 965.

[85] See the same rule applied to state taxation in *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 100.

[86] See footnote 13, p. 118, *infra.*

state license to practice medicine. Thus the levy not only took a general public policy into account, but depended for its incidence on state regulation which in no sense related to a power vested in Congress.

If, contrary to the rule enunciated in these cases, this Court were to consider the various policies which Congress had in mind when it enacted Title IX of the Social Security Act, we submit that the policies are reasonably related to the specific power conferred by Article I, Section 8, Clause 1 since they are concerned only with the raising and spending of money for the general welfare of the United States.

The policy of the clause is clearly stated in the Constitution. The power given to Congress is a power to tax "to provide for the general Welfare of the United States." Or, as this Court has said, the power "granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare." *United States* v. *Butler,* 297 U. S. 1, 64.

Before examining the policies involved in the statute at bar, we pause to make explicit the narrow interpretation of these quotations which will serve to support our argument. We understand that the Constitution and this Court have sanctioned a tax which provides *funds* for the general welfare. Beyond this we do not need to go. We do not need to assert, and we do not here assert, that Congress has the power to formulate any substantive regulations which may, in a loose or popular sense, be regarded as "for the general welfare", and then attach to such regulations penalties in the guise of taxes or rewards in the guise of credits. Compare *The Child Labor Tax Case,* 259 U. S. 20; *United States* v. *Butler,* 297 U. S. 1, 64; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 292. We make only this point, that if the policies of a tax are to be considered, the policies here involved relate to providing *funds* for the general welfare.

In the first place, the policy of the tax and credit is to remove obstacles which have prevented States from enacting their own unemployment compensation laws, and to encourage them to take such action.[87] The enactment of such state laws will make financial provision which, in view of the economic data already presented, is plainly financial provision for the general welfare of the United States. We have shown that when the unemployed are without funds, "the individual health, safety and welfare are sacrificed or neglected", and from these individual disasters, the nation suffers since "the whole is no greater than the sum of all its parts". *Holden* v. *Hardy,* 169 U. S. 366, 397, quoted with approval in *West Coast Hotel Co.* v. *Parrish* No. 293, October Term, 1936, March 29, 1937. Moreover, we have shown that in our present economy, when States neglect to make timely provision for the unemployed, a drain such as we have already experienced *upon the national treasury is correspondingly* ~~*de*~~in*creased.* The unemployed workers cannot be left to starve. Their misfortune "casts a direct burden for their support on the community". *Ibid.* As this Court stated in the *Parrish*, case:

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[87] It will be recalled that under Section 902 a credit against the Title IX tax "shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in Section 903." And Section 903 (a) (4) limits a certification to cases in which the state law provides that all contributions "shall be used solely in the payment of compensation," that is, in "cash benefits payable to individuals with respect to their unemployment." Section 907 (g). In short, these statutory clauses make it clear that the credit, taken together with the state law, is designed to provide funds for unemployed persons. See also the Senate Committee report quoted at length in footnote 97a, p. 69, *infra.*

> What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land.

In the second place, the policy of the tax and credit minimize what is, in effect, double taxation. In a State that has an unemployment compensation law, the State is already requiring the taxpayer to make financial contribution for the general welfare. It seems most unjust to impose a substantial additional burden on him, particularly when the burden is to furnish revenue which, like other revenue, will be used by the nation less in his State than in States which have neglected to make timely provisions for the unemployed. The avoidance of double taxation has always been regarded as a policy peculiarly appropriate to the purposes of the congressional taxing power.

Even before the Constitution was ratified by the requisite number of States, double taxation was an object of deep concern. Hamilton recognized that the two governments might effectuate "an improper accumulation of taxes on the same object," but he "hoped and presumed, however, that mutual interest would dictate a concert in this respect which would avoid any material inconvenience." *Federalist* (Lodge ed.) No. 33, p. 194. See also No. 32, pp. 188–189; No. 36, p. 211. And Edmund Randolph, in discussing in the Virginia Convention the question of the power of taxation enjoyed by both nation and State, said that "It will most certainly be the interest of either to avoid imposing a tax on an article, which shall have been previously taxed by the other." Remarks of Edmund Randolph in the Virginia Convention, June 7, 1788, Farrand, *Records of the Federal Convention,* Vol. 3, p. 309.

Moreover, the more equitable distribution of tax burdens through the avoidance of double taxation, long a matter of legislative solicitude, has justified many classifications in tax statutes.

Again, on this point, *Florida* v. *Mellon,* 273 U. S. 12, is an authority. Other examples are collected in the margin.[88]

Continuing on the assumption that this Court, in reviewing a tax statute, will examine the congressional policies, we next turn to the issue whether, if the policies here involved are related to the specific power conferred by Article I, Section 8, Clause 1, they have been executed in accordance with one of the ways in which that clause was intended to operate.

The petitioner may contend that the policies cannot be carried out by means of a credit. This issue, we think, is settled in this Court. Congress can carry out its policy by a credit against, or exemption from, a tax, just as it can by the tax itself. This is shown by a host of precedents, including *Florida* v. *Mellon, supra; Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1; *Flint* v. *Stone*

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[88] Revenue Act of 1936, Secs. 23 (c), 26 (b), 31 and 131; Revenue Act of 1934, c. 277, 48 Stat. 680, Secs. 23 (c), 31, 102 (h) and 131. Report of the House Committee on Ways and Means on Double Taxation (1933). See also those cases in which it has been held that the avoidance of double taxation furnishes a proper basis for a classification in a state tax law. *Kidd* v. *Alabama*, 188 U. S. 730; *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364; *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Watson* v. *State Comptroller*, 254 U. S. 122, 124–125; *Klein* v. *Board of Tax Supervisors*, 282 U. S. 19; *Lawrence* v. *State Tax Commission*, 2[illegible] U. S. 276, 284; *Liggett Co.* v. *Lee*, 288 U. S. 517, 533; *Colgate* v. *Harvey*, 296 U. S. 404, 419–422; *State Board* v. *Young's Market Co.*, 299 U. S. 59, 64; *Henneford* v. *Silas Mason Co.*, No. 418, October Term, 1936, March 29, 1937.

Tracy, 220 U. S. 107; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; and *Knowlton* v. *Moore,* 178 U. S. 41. And the available credit or exemption can be a very substantial one: in *Florida* v. *Mellon,* it was 80 per cent; in the *Spreckels* case, it was $250,000.

Moreover, quite apart from these adjudged cases, and as an alternative, we submit that a statute which lays a tax and allows a credit to taxpayers in States that provide funds for the general welfare is a valid exercise of the power conferred in Article I, Section 8, Clause 1. The clause on its face merely requires that the power be so exercised as to "provide [funds] for the general welfare." See page 47, *supra.* The Constitution does not stipulate who shall make the provision or under whose rules the funds shall be either collected or applied. This Court has already, in *Massachusetts* v. *Mellon,* 262 U. S. 447, refused to read into the Constitution a stipulation that the *application* of the funds must be by the nation, and not by the States. And the contemporaneous exposition of the Constitution by the Framers, the precedents of nineteenth century legislation, and the objective of the constitutional power here involved, show that there should not be read into the Constitution a stipulation that the *collection* of funds must be by the nation, and not by the States.

The Federalist papers of Hamilton (*Federalist,* Lodge ed., No. 36, pp. 211, 212) and Madison (*Id.,* No. 45, p. 290) and the joint report of Roger Sherman and Oliver Ellsworth to the Governor of Connecticut, dated September 26, 1787 (Farrand, *supra,* Vol. 3, pp. 99–100), make it appear that the Framers contemplated that three methods would be available to provide funds for the general welfare of the United States: (1) taxation entirely prescribed by Congress and entirely collected by federal officers [this system is almost universally followed today]; (2) taxation prescribed by Congress, but collected by state officers acting either as federal agents or under the regulations of the States [this system was apparently never followed, although it was considered in the debates of the first Congress. 1 *Annals of Congress* 367, May 18, 1789] and (3) taxation prescribed by Congress with an option to the States to secure for themselves and their citizens tax exemption or tax remission where they make their own financial provision "for the general welfare of the United States."

Title IX may be regarded as falling within this third class. This statute remits in part the exercise of the federal power to collect taxes in a State that has provided its financial quota for the general welfare of the United States. In the words of Sherman and Ellsworth, Congress has provided that its collecting "authority need not be exercised, if each state will furnish its quota." Farrand, *supra,* Vol. 3, p. 100. Or, as Hamilton said, "When the States know that the Union can apply itself without their agency, it will be a powerful motive for exertion on their part." *Federalist*, No. 36, p. 211.

A method corresponding in principle with the one here employed was evolved in connection with direct taxes imposed by Congress in the nineteenth century.[29] During the Civil War period, Congress imposed direct taxes under which the States were given the right to assume the tax and receive a credit for prompt payment. Act of Aug. 5, 1861, c. 49, 12 Stat. 292, and Act of May 13, 1862, c. 66, 12 Stat. 384. It is interesting to note that when the first of these two taxes was under consideration in the House of Representatives, Representative Roscoe Conkling of New York offered (and, except for administrative reasons presented by the Treasury, would probably have carried) a proposal to allow the same sort of assumption by the States of federal *excise* taxes due from their citizens.[60] What is even more interesting, and for purposes of this case extremely significant, is that, from this 1862 tax, which, like the present tax, was upon individuals (*United States* v. *Louisiana,* 123 U. S. 32, 38), Congress provided that there should be deducted as a credit all amounts incurred by States "in enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the present insurrection against the United States." 12 Stat. 384. This deduction, like the present credit, was given for amounts collected and expended by a State "to provide for the common defence and general welfare of the United States", and redounded to the benefit, presumably *pro rata,* of individual citizens. Every State in the Union except Delaware indicated that it would take advantage of the right to assume and pay its quota of the direct tax,[61] and the following States paid all or most of their direct tax by application of claims against the United States for expenses in connection with the troops they sent to the federal army: New Hampshire (see New Hampshire Laws, 1862, p. 2639), New York (see New York Senate Ex. Doc., 1863, No. 4, pp. 7–10), Pennsylvania (see Pennsylvania Laws, 1862, p. 18), West Virginia (see Act of June 21, 1866, c. 128, 14 Stat. 68), Michigan (see Michigan Laws, 1862, pp. 1–2), Wisconsin (see Wisconsin Laws, 1862, p. 127), Indiana (see Indiana Laws, 1865, p. 47), Maine (see Maine Acts and Resolves, 1862, p. 173), Missouri (see Act of April 17, 1866, c. 46, 14 Stat. 39). These facts were reported to Congress.[92] Moreover, although the credit was never judicially passed upon, this Court apparently did regard the assumption by the States of the direct taxes owed by their citizens as authorized by the Constitution. *United States* v. *Louisiana,* 123 U. S. 32, 38.[93]

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[29] The first direct tax was laid by the Act of July 14, 1798, c. 75, 1 Stat. 597. Although it had been suggested that the States themselves assume and pay the quota imposed upon their citizens, this suggestion was rejected in view of the unsatisfactory experience with that procedure under the Articles of Confederation. *Report of Oliver Wolcott, Jr., Secretary of the Treasury, to the House of Representatives, Dec. 14, 1796*, American State Papers, Finance, Vol. 1, pp. 414, 436.

Direct taxes thereafter fell into disuse until the War of 1812. Then in the direct tax acts of August 2, 1813, c. 37, 3 Stat. 53; January 9, 1815, c. 21, 3 Stat. 164; and March 5, 1816, c. 24, 3 Stat. 255, Congress permitted the States to assume and pay the amounts apportioned them, and, indeed, allowed to each State a deduction of 15 per cent if it made the payment promptly. 3 Stat. 71, 179, 256. Seven States took advantage of this method of payment in 1814; and four took advantage in 1815 and 1816. Adams, Henry Carter, *Taxation in the United States, 1789–1816*, page 68.

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[60] *Congressional Globe,* 37th Cong., 1st Sess., p. 247, col. 1; Smith, Harry Edwin, *United States Federal Internal Revenue Tax History from 1861 to 1871*, p. 71.

[61] Senate Ex. Doc. No. 24, 46th Cong., 1st Sess. (1879) p. 13.

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[92] In his annual report on finances sent to Congress on December 10, 1863, Secretary of the Treasury Chase stated that direct tax receipts were estimated at $11,620,717, and that this amount, or nearly this amount, had been received in the form of payments for military supplies and services by the States, for which they were entitled to credit beyond their several proportions of the tax. He said, however, that in consequence of incomplete settlements, only the sum of $1,485,103 appeared on the books as received into the Treasury. Annual Report on Finances of the Secretary of the Treasury, December 10, 1863, 38th Cong., 1st Sess., House Executive Documents, Vol. 6, No. 3.

[93] "It allows, it is true, the different States to assume the amounts apportioned to them respectively, and to collect the same in their own way by their own officers. Many of the States did thus assume the amounts, and in such cases it may well be considered that for the sums assumed they be-

The use of a tax credit where a State serves to relieve a drain on the national Treasury was indeed known and approved even before the Constitution.[64]

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came debtors to the United States, and, so far as any portion of those sums has not been paid, that they still remain debtors. But, unless such assumption was had, no liability attached to any State in her political and corporate character. The liability was upon the individual land owners within her limits." 123 U. S. 32, 38.

[64] On September 4, 1782, it was resolved by the Continental Congress that a quota of $1,200,000 be imposed on the States and that the money so raised in each State should be applied for the payment of interest due on certificates issued from the loan office of such State and other liquidated debts of the *United States* contracted therein before any part thereof should be paid into the public treasury. It was further recommended to the several States that certain specified taxes be imposed by them, consisting of a tax on land, a poll tax, and an excise on liquors, and that *they* appropriate the money to arise therefrom to the payment of the debts of the United States. It was ordered that these resolutions be referred to the Grand Committee to assess and report the quota of each State. Journals of the Continental Congress, Vol. 23, 1782, pp. 545–546. On September 10, 1782, the Grand Committee reported the apportionment, which was confirmed. *Id.*, pp. 564–571.

These resolutions were referred to in a report on April 5, 1784 (Journals of the Continental Congress, Vol. 24, 1784, pp. 185–196) by a grand committee including, among others, Thomas Jefferson and Roger Sherman. The committee there said with regard to the 1782 resolutions (p. 188):

> This requisition gave license to the States, to apply so much as should be necessary of their respective quotas of it to the payment of interest due on Certificates issued from the Loan office of their own states, and other liquidated debts of the United States contracted therein. Hence they suppose it has happened, that the actual payment of these quotas, have been uncommunicated to the Office of finance for the United States.

We thus see that it is not a novel idea for Congress to exercise its power to collect taxes in a manner that recognizes the cooperative rôle played by a State that has taken financial steps "to provide for the common defence and general welfare of the United States." Where a State itself directly raises and applies funds for the common defence and general welfare of the United States, thereby relieving *pro tanto* the Federal Treasury, Congress has in the past recognized the equitable claim of the State and its citizens to reduction of their tax burden. Such reduction clearly bears a reasonable relation to the taxing power and cannot be said to rob the tax of its constitutional character or to convert it into an attempted exercise of some other power not granted to Congress.

Even if there were not these two alternative bases of precedent, one based on the tax and credit upheld in *Florida* v. *Mellon,* and the other based on the direct tax of 1862, we submit that approval of this tax is required by a realistic interpretation of Article I, Section 8, Clause 1, of the Constitution. The objective or end of the clause is to make financial provision for the general welfare. It would be almost absurdly unrealistic to advance the novel principle of constitutional law that, though the national government may, out of its general revenue spend either directly or indirectly by grants to the States, for relief, it cannot by a tax and credit avoid a repetition of the present situation, which is so perilous to the finances of the nation and which involves a central administration inevitably more complex, and often less efficient, than local administration. To such unrealism, the answer is "that to a constitutional end many ways are open." *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 291.

II

THE TAX IMPOSED BY TITLE IX DOES NOT CONTRAVENE THE FIFTH AMENDMENT

It is only in rare and exceptional circumstances that the Fifth Amendment operates as a limitation upon the taxing power (*Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44), and then only if the challenged statute be so arbitrary or capricious as to compel the conclusion that it does not involve an exercise of the taxing power at all but constitutes a confiscation of property. *Helvering* v. *City Bank Co.,* 296 U. S. 85, 90; *Nichols* v. *Coolidge,* 274 U. S. 531.

The asserted absence of due process here arises primarily from two contentions: First, that property is arbitrarily taken from one class and given to another; and, second, that various selections and classifications in the Act are arbitrary.

A. There is no taking of property from one class for the benefit of another

It may be argued that the tax operates to take property from one class and bestow it upon another in violation of the Fifth Amendment.

Such contention, however, would be based upon an assumption of fact which is wholly false, namely, that the tax proceeds are paid out to the employees as unemployment compensation. Wholly unlike the contributions involved in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, no portion of the taxes collected under Title IX is made available in any form to employees. All unemployment insurance benefits to employees are paid out of local funds, no part of which ever consisted either directly or indirectly of Federal money. There is therefore no need to consider whether such expenditures would result in a violation of due process if paid out of the funds raised by this tax.

The only possible Federal expenditures under the Social Security Act that relate even remotely to unemployment insurance are authorized by Title III. There, Congress merely authorized appropriations, relatively small in amount, for state *administration* expenses. And, as we will later show in Point IV, *infra,* not only is the validity of Title IX wholly independent of Title III, but also the appropriations authorized in Title III are in any event proper.

B. The various selections and classifications do not violate the Fifth Amendment

By virtue of the definitions contained in Section 907, the tax is not applicable in the case of employers of less than eight individuals, agricultural labor, domestic service, seamen, government service, employment by certain relatives, and employment by charitable and like organizations. These *selections* as well as the classification permitting the 90 percent credit and certain related classifications may perhaps be attacked as arbitrary and therefore violative of the due process clause.

While, as indicated above, it is clear that the due process clause may strike down a purported exercise of the taxing power where the statute amounts to a confiscation of property, the Fifth Amendment has never been thought to apply where Congress has merely *selected* the subjects for taxation, and there is grave doubt whether it applies to mere classifications in tax statutes.

As to selections in a Federal tax statute, it is clear that the taxing power would be crippled if an excise could be defeated merely by showing that Congress in imposing a tax on certain acts or privileges had failed to include certain other similar acts or privileges. To implement the taxing power, Congress must have plenary powers of *selection*. The Court was particularly directing its attention to this question when it said in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158:

> In levying excise taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one call-

> ing and omit another, to tax one class of property and to forbear to tax another.
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> * * *

Cf. *Sonzinsky* v. *United States,* No. 614, October Term, 1936, decided March 29, 1937.

That the Fifth Amendment does not apply in the case of *selections* is made clear by the many occasions on which the Court has approved the selection of specific subjects for Federal taxation without requiring the taxation of similar subjects. See *Flint* v. *Stone Tracy Co., supra,* at 159. Striking, indeed, is the stamp tax imposed upon "calls" but not upon "puts." *Treat* v. *White,* 181 U. S. 264. See also *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1. We submit, therefore, that the selections occasioned by the definitions in Section 907 of the Act should not be open to judicial scrutiny under the Fifth Amendment.

There is also grave doubt whether the Fifth Amendment applies to the classification resulting from the 90 percent credit and the conditions imposed by Section 903 (a). Classifications in *state* legislation are, of course, subject to the Fourteenth Amendment. But the Fourteenth Amendment, unlike the Fifth Amendment, contains, in addition to the due process clause, the *equal protection* clause. This Court, in considering the question of classification under the Fourteenth Amendment, has uniformly related that issue to the equal protection clause rather than to the due process clause. See, for example, *Colgate* v.

Harvey, 296 U. S. 404, 419–422. It is true that the two clauses may, within certain limits, be coextensive, but it is also true that the equal protection clause has an independent sphere of action. It is within that independent sphere that the classification questions fall. Such, no doubt, must have been the analysis of this Court when it declared through Mr. Justice Holmes in *La Belle Iron Works* v. *United States,* 256 U. S. 377, 392:

> The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by Art. I, § 8 * * *.

See also *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62. Indeed, the Court has often stated that no Fifth Amendment question is involved. *Treat* v. *White,* 181 U. S. 264, 269; *McCray* v. *United States,* 195 U. S. 27, 61; *Billings* v. *United States,* 232 U. S. 261, 282; *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1, 23–24; *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 450–451.

However, even if the selections and classifications involved herein are examined under the Fifth Amendment, they will be found reasonable and amply justified by precedent.

1. The selections arising from the Section 907 definitions are reasonable

The exemption of employment by States is, of course, merely declaratory of their implied constitutional immunity from Federal taxation. Cf.

Plummer v. *Coler,* 178 U. S. 115, 118. In exempting employment by the United States, Congress simply avoided the useless procedure of self taxation.

Exemptions of charitable organizations, agricultural labor, domestic service, seamen and service within the family are of a type long familiar in our internal-revenue laws. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Knowlton* v. *Moore,* 178 U. S. 41; *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1; *Bromley* v. *McCaughn,* 280 U. S. 124; *New York Trust Co.* v. *Eisner,* 256 U. S. 345. Comparable exemptions by state legislatures have been attacked and uniformly sustained under the Fourteenth Amendment. *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 159; *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285, 291; *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165; *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Billings* v. *Illinois,* 188 U. S. 97; *Keeney* v. *New York,* 222 U. S. 525; *Northwestern Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89.

Moreover these selections may be justified by the prohibitive practical administrative difficulties in such cases. Cf. H. Rep. No. 615, 74th Cong., 1st Sess., p. 33, and S. Rep. No. 628, 74th Cong., 1st Sess., p. 45, dealing with the similar exemptions to the tax levied by Title VIII of the Act. The difficulties in requiring the maintenance of proper records by housewives and farmers, and the almost impossible task of properly enforcing the Act as to them, give adequate basis for distinction. The expense of collection might well far exceed the revenue to be obtained. In the case of officers and members of the crew of vessels engaged in the foreign or coasting trade, administrative obstacles would be encountered in segregating the services performed within and without the United States. Considerations of administrative difficulties such as these have often been held to afford a proper basis for classification. *Hatch* v. *Reardon,* 204 U. S. 152; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *La Belle Iron Works* v. *United States,* 256 U. S. 377; *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285.

The fact that the exemption of small employers is fixed numerically at eight in no way operates against the validity of the classification. Congress might distinguish between large employers and small employers on the ground of administrative convenience, or for the recognized reason that large employers have a higher percentage of unemployment, and so create a greater drain on the Federal Treasury.[46] This Court has held in like situations that it is within the discretion of the legislature to designate the number which will constitute the

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[46] The following table, the result of a thoroughgoing nation-wide study of all industries, depicts the effects of the

dividing line. *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571; *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *St. Louis Cons. Coal Co.* v. *Illinois,* 185 U. S. 203; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 159; *Miller* v. *Strahl,* 239 U. S. 426, 434; *McLean* v. *Arkansas,* 211 U. S. 539, 551; *Booth* v. *Indiana,* 237 U. S. 391, 397. Cf. *Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1; *Knowlton* v. *Moore,* 178 U. S. 41; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; *Bromley* v. *McCaughn,* 280 U. S. 124.

The selections arising out of Section 907 are, therefore, in no way arbitrary or capricious. They

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1920–21 depression, and gives ample foundation for a distinction between large and small firms:

A comparison of the volume of employment per [illegible] year *at the peak and in the trough for leading industrial groups (1920–1921 depression)*

Employees per concern	Full Time Hours (Millions)			Hours Actually Worked (Millions)		
	Peak	Trough	Percent Decline	Peak	Trough	Percent Decline
0–20	7.106	6.892	3.00	6.956	6.742	3.08
21–100	3.132	2.640	15.71	2.926	2.521	13.84
Over 100	9.215	6.997	24.07	9.181	6.589	28.23

King, *Employment Hours and Earnings in Prosperity and Depression, United States 1920–1922*, p. 60. Results of an inquiry conducted by the National Bureau of Economic Research with the help of the Bureau of Markets and Crop Estimates and the Bureau of the Census for the President's Conference on Unemployment.) The difference between the Full Time Hours and Hours Actually Worked represents the amount of work gained through overtime, or lost through part-time work.

are of the type repeatedly sustained, and should be approved here.

2. *The 90 percent credit*

While the most that the due process clause can require of a classification in a tax statute is that it be reasonable—and the reasonable basis for the classification may be founded on policies entirely unrelated to the production of revenue [96]—we have

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[96] For example, charitable corporations pay no income taxes. See, *e. g.*, Revenue Act of 1936, Sec. 101; Revenue Act of 1934, Sec. 101, c. 277, 48 Stat. 680. And, within certain limits, gifts to charity are deductible under the income, estate and gift tax laws. See, *e. g.*, Revenue Act of 1936, Sec. 23 (o), (q); Revenue Act of 1935, Sec. 102 (c), amending Sec. 23 of the Revenue Act of 1934, *supra*. Such exemptions, it is plain, are based upon broad social aims, entirely unrelated to revenue measures as such.

Similarly, the exemption of yachts of domestic construction in the tax on the use of yachts was predicated upon a similar policy of encouraging shipbuilding in this country. See *Billings* v. *United States*, 232 U. S. 261. Again, the differences in rate of tax on colored and uncolored oleomargarine were not founded on fiscal policy. See *McCray* v. *United States*, 195 U. S. 27.

Revenue acts frequently grant exemptions to certain classes in a way that is justified only by a general sense of fairness. Thus the $3,000 exemption to unmarried persons and the $4,000 credit to married persons did not invalidate the Revenue Act of 1913 (c. 16, 38 Stat. 166). *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1. The $40,000 exemption as to insurance under the estate tax law does not affect its validity. *Chase National Bank* v. *United States*, 278 U. S. 327.

Many other revenue statutes containing classifications wholly unrelated to Federal taxation have received judicial already shown that the 90 percent credit is predicated upon two predominantly fiscal policies.

1. The first justification for the 90 percent credit may be found in the general policy of reducing double taxation. (See pages 49–51, *supra.*) If no such credit were allowed, an employer in a State having an unemployment insurance measure would have to pay twice, once to the state fund and then to the Federal Government. Such a result not only would impose a disproportionate financial burden upon such employers, but also would subject them to a business disadvantage in competition with other employers.[97]

2. In addition, the 90 per cent credit may be justified under the fiscal powers in another and perhaps more significant manner. To the extent that em-

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approval. Thus a statute taxing sales made at commodity exchanges but not elsewhere has been upheld. *Nicol* v. *Ames*, 173 U. S. 509. A stamp tax upon "calls" but not upon "puts" has been sustained. *Treat* v. *White*, 181 U. S. 264. Allowances for depreciation have been permitted while denied as to depletion in connection with an income-tax statute. *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503. A striking classification has been sustained between corporations obtaining funds by issuing bonds and those issuing stock. *Anderson* v. *Forty-Two Broadway Co.*, 239 U. S. 69. An income-tax statute permitting depletion allowances but limiting such allowances to 5 percent of the gross output has been upheld. *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103.

[97] See Message of the President recommending Legislation on Economic Security, January 17, 1935, H. Doc. No. 81, 74th Cong., 1st Sess., p. 3; Senate Report No. 628, 74th Cong., 1st Sess., p. 13.

ployers make contributions to state funds, the Federal Government makes substantial financial gains, for the operation of these funds will result in a reduction of relief expenditures of the Treasury. In recent years these expenditures have been enormous, and in future years, unless provision is made, they may continue to be large. See pp. 22–24, *supra.*[97a]

In short, the amounts not paid as a tax, but credited against it serve a very real Federal *fiscal* purpose.[98]

[97a] Congress was very much aware of the *fiscal* purposes that would be served by the credit. The report of the Senate Committee on Finance declares (S. Rep. No. 628, pp. 15–16): "This country has expended far more for unemployment relief during this depression than the total expenditures of all other countries that have unemployment compensation systems during the entire time these systems were in operation. Unemployment compensation will not completely eliminate the necessity for unemployment relief. To the extent, however, that unemployment reserves are accumulated, they will reduce the necessity for relief. In normal periods, unemployment compensation will provide a sufficient safeguard for most of the unemployment that will occur, and in depression periods, will very materially reduce the burden of relief costs. * * *" See also H. Rep. No. 615, *supra*, p. 16.

[98] The custom of giving a deduction from taxes to those whose conduct serves a Federal purpose is as old as the Congress itself. The very first Congress, presumably actuated by a desire to avoid the expense of building a large navy, and a desire to stimulate citizens to build or to purchase ships, provided that "a discount of ten percent on all the duties imposed by this [tariff] act, shall be allowed on such goods, wares and merchandises, as shall be imported in

3. The conditions in Section 903 (a)

In order that a taxpayer may avail himself of the 90 percent credit offered in Section 902, it is necessary that the state law under which he has made his contribution shall comply with certain minimum criteria contained in Section 903 (a). Those criteria (most of them merely definitional in character) are valid classifications not only because they are reasonable, but also because they were designed to advance the fiscal policy of the Federal Government.

Moreover, the conditions are clearly separable from the remainder of the statute. The intention of Congress that the various provisions of the Act should be separable is plainly stated in Section 1103. And unless clear evidence of structural inseparability should appear to overcome the prima facie meaning of the language of Congress, such legislative intention must be given effect. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312–313; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241. This Court has often refused to strike down a statute merely because of the invalidity of conditions therein, where such conditions do not go to the heart of the statute, and are subordinate in charac-

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vessels built in the United States, and which shall be wholly the property of a citizen or citizens thereof, or in vessels built in foreign countries, and on the sixteenth day of May last, wholly the property of a citizen or citizens of the United States, and so continuing until the time of importation." Section 5 of Act of July 4, 1789, c. 2, 1 Stat. 24.

ter. See *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 185; *Huntington* v. *Worthen,* 120 U. S. 97, 102; *Highland Farms Dairy, Inc.* v. *Agnew,* No. 573, October Term, 1936, March 29, 1937. *Cf. Tiernan* v. *Rinker,* 102 U. S. 123; *National Life Ins. Co.* v. *United States,* 277 U. S. 508; *United States* v. *Chicago, etc. R. Co.,* 282 U. S. 311. The instant case is much stronger, for the very theory that might operate to invalidate these conditions—namely, that they are wholly unrelated to unemployment compensation—would establish their secondary character, and thus render them separable. And, finally, the presumption of separability of secondary conditions operates even more strongly in the case of a revenue measure of general application. See *Field* v. *Clark,* 143 U. S. 649, 696–697.

Section 903 (a) is divided into six clauses, of which five (clauses 1, 2, 4, 5 and 6) are closely related. Clause (3) is related to the Federal fiscal powers in a somewhat different way and will be discussed separately.

A. CLAUSES (1), (2), (4), (5), AND (6) OF SECTION 903 (A)

We have shown above that the 90 per cent credit constitutes a reasonable classification, since the necessity of Federal expenditures for unemployment relief is diminished by the operation of state unemployment compensation laws. In allowing that credit it is essential, therefore, to make certain that the state law under which the taxpayer makes his contribution is a genuine and workable unemployment insurance measure. For, if the state statute were merely masquerading as an unemployment compensation law and had been enacted only to enable the taxpayer to take advantage of the credit or for some other foreign purpose, the Federal fiscal policies which the 90 percent credit is calculated to serve would be frustrated. Accordingly, clauses (1), (2), (4), (5) and (6) of Section 903 (a), merely set up a series of five tests to determine whether the state unemployment compensation law is genuine and workable.

Briefly stated, an unemployment compensation law is a law which provides for the accumulation of reserves for the payment of benefits to involuntarily unemployed persons. Each of the provisions listed in Section 903 (a) (with the possible exception of Clause (3), which will be discussed later) will be found, upon analysis, to constitute an element necessary in showing that the law in question is a proper and workable enactment designed to serve the purpose mentioned, and not some other or different purpose. Accordingly, since they represent merely definitional criteria of what is a true unemployment compensation measure, they are proper classifications, reasonable in character and related to the federal fiscal power.

First.—Obviously, the first step in any unemployment compensation plan is that the funds must be provided. Because of the impossibility of foreseeing future developments in the labor market and the thorough unpredictability of general business activity, the burden of unemployment compensation and the extent of the drain upon an unemployment fund will vary greatly from year to year. In order to assure the solvent operation of the law for a reasonable period, it is therefore essential that a reasonable reserve be accumulated in the fund before compensation becomes payable."[99]

Thus Section 903 (a) (2), which provides that no compensation shall be payable until two years after contributions begin to accrue, merely embodies the first essential of an unemployment compensation plan, namely, that a fund be accumulated.

Second.—When a fund has been accumulated, the most fundamental element of an unemployment compensation plan must be that the money be used for the purpose of paying benefits to unemployed individuals, and not for some other or totally different purpose. Clause (4) of Section 903 (a) supplies this vital criterion by providing that all money in the state unemployment fund shall be used solely in the payment of unemployment compensation.

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[99] Experience abroad has shown that solvent operation cannot be accomplished unless a reserve is accumulated at the outset by commencing the collection of contributions a considerable time before the payment of compensation begins. See Hansen, Murray, Stevenson, and Steward, *A Program for Unemployment Insurance and Relief in the United States* (1934), pp. 74–75.

Third.—Equally fundamental in the theory of unemployment compensation is the necessity that compensation be paid, not to the merely idle or shiftless, but only to the unemployed—i. e., to persons who are willing and able to take work, but not able to find it. There is only one objective test for determining whether a man is willing to work, and that is to offer him a job and see whether he takes it. For this reason the agency through which unemployment compensation is paid must be coordinated with an agency which is in a position to determine what work is available and to offer such work to applicants for benefits. At some point prior to the actual payment of compensation, contact between the claimant and such an agency is essential. Consequently Clause (1) of Section 903 (a) provides that "compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve." It does not require that compensation be paid *at* the employment office. The actual payment might be made at any office or by any means the State sees fit. On the other hand, agencies other than public employment offices might be able to test a claimant's genuine involuntary unemployment by offering him work. In order that the use of such agencies might not be precluded to the States, the Social Security Board is authorized to approve such other agencies.

Fourth.—Incidental to testing the genuineness of claimant's involuntary unemployment by offering him a new job is some workable standard for determining the suitability of the new job offered. Manifestly benefits should not be denied to a man who refuses unsuitable work, if he is otherwise eligible. A law without a standard for determining the suitability of the new work offered could not constitute a genuine unemployment compensation law. And since the number of claims will be large but the amount of compensation that will be payable to each individual claimant will be comparatively small, an unemployment compensation law would not constitute a workable law unless the standards of suitability governing the new work offered were self-evident and comparatively automatic in their operation.

The only simple objective test, which depends upon external evidence rather than an exercise of individual judgment, and which, for many years, has been used as a standard in government contracts, is that the wages, hours, and other conditions shall not be substantially less favorable than those prevailing for similar work in the locality at the time. Clause (5) of Section 903 (a) contains this condition. In addition, under the same clause, the state law must provide that benefits shall not be denied to an otherwise eligible individual for refusing to accept work in connection with which he would be compelled to engage in strike-breaking activities or to sign a yellow-dog contract. The purpose of these latter provisions (which are discussed in more detail *infra,* pp. 111–112) is to assure that, at least in the respects indicated, a state unemployment compensation law shall be confined to its proper purpose, and shall not be used as a labor relations act or as an instrument of labor policy. A State might include any number of other standards. The inclusion of these minimum standards in the state law in no way precludes the worker from accepting the new work offered. Such standards merely provide a workable objective test for determining the conditions under which an otherwise eligible claimant of compensation may refuse to accept the job offered to him without disqualifying himself from receiving compensation.

Fifth.—Finally, the last essential attribute of an unemployment compensation law is that in order to be workable over any period of time it be subject to modification. Experience in other countries in unemployment compensation has demonstrated conclusively that it is a very difficult legislative task to create an unemployment compensation system which is practicable in all of its details, and which is responsive to economic changes. This experience, together with the lack of adequate statistical information in this country and the fact that unemployment compensation is a comparatively new undertaking here, indicates the absolute need for the provision that there must be no finality in the initial legislation enacted. Clause (6) of Section 903 (a). The fifth attribute of an unemployment compensation law is simply that its flexibility be preserved, so as to permit change in the particular provisions of the law.

Thus, the provisions enumerated in Section 903 (a) merely serve as a definition or description of an unemployment compensation law. They enumerate the distinguishing qualities which differentiate such a law from a law for a different or other purpose. Since they thus operate to insure the existence of a *bona fide* state unemployment compensation measure, they are reasonable provisions, related to the federal fiscal powers by reducing substantially the necessity for federal expenditures. As such they constitute reasonable classification complying fully with the requirement of due process in the Fifth Amendment.

B. CLAUSE (3) OF SECTION 903 (A)

The provision, embodied in Section 903 (a) (3), that amounts paid to a state unemployment fund shall not be credited unless "all money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904" stands on a footing somewhat different from the other provisions in Section 903 (a).

It is not entirely different, to be sure. This provision, in common with the other provisions, is designed to make certain that no credit is given unless the law adopted by the State is workable and will in fact relieve the drain on the federal treasury. The provision is designed to avoid the danger that the state system will break down because the funds raised are not invested with due regard to safety and liquidity. Unemployment funds are peculiarly subject to the possibility of losses even when invested carefully, for they must be built up during periods of prosperity and high prices, and liquidated during times of business recessions, when prices of securities have fallen. This difficulty is avoided by clause (3).

But Section 903 (a) (3) represents something more than the other provisions, for it involves direct participation by the Federal Government in one aspect of the state law. Read together with Section 904, this section in effect provides that credit will be given for payments only under such state laws as stipulate that the funds collected must be invested in certain types of United States bonds. So stated it is obvious that this provision does not involve an arbitrary exercise of the federal power. In one sense, *it is offering a bounty to those who create a market for government securities.*

Section 903 (a) (3), however, is primarily designed to enable the Federal Government to continue its effective regulation of the amount and flow of credit. *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 303; *Juilliard* v. *Greenman,* 110 U. S. 421; *McCulloch* v. *Maryland,* 4 Wheat. 316. The accumulation of unemployment compensation funds under the uncoordinated managements of the respective States and their investment in miscellaneous securities would obstruct federal regulation of credit and lessen federal protection of the market for government bonds. Under these circumstances, Congress has power to adopt such measures as are reasonably necessary to the execution of its expressly delegated powers.

It has been estimated that had an unemployment compensation law or laws been in effect in the United States during the years 1922 to 1929, under which contributions at the rate of three percent on payrolls were required, between $2,000,000,000 and $2,500,000,000 would have been accumulated and been in the fund or funds in 1929 (Report of the Committee on Economic Security (1935), 74th Cong., 1st Sess., page 14).

Irrespective of the manner in which such a substantial sum had been invested, its investment and sudden liquidation during a major depression period might have substantial effects upon the entire monetary system. If invested in government bonds, their appearance in large blocks on the market at a time of financial crisis might seriously impair the efforts of the government to borrow money and might hamper the efforts of the Federal Reserve System to control the credit situation. The Federal Reserve System would probably absorb the government bonds, but their volume might well be so large as to interfere seriously with the policy of its Open Market Committee of buying government bonds to mitigate deflationary tendencies during the period of business recession.

The withdrawal from commercial and savings banks of these large sums would encroach substantially upon the total quantity of bank credit available during a business recession. If invested in state, municipal, or private securities, the liquidation of such securities at the very time that the securities market was at its lowest point would increase deflationary tendencies and might further impair the operations of the Open Market Committee of the Federal Reserve System. If hoarded in cash the withdrawal from circulation of so substantial a part of the basic money supply would have disastrous effects and might wholly nullify the Federal Reserve System as a measure to control the credit system.

The considerations which influenced Congress to create the Trust Fund were summarized by the Committee on Ways and Means of the House of Representatives as follows:[1]

> This last provision will not only afford maximum safety for these funds but is very essential to insure that they will operate to promote the stability of business rather than

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[1] H. Rep. No. 615, 74th Cong., 1st Sess., p. 9. A similar statement appears in the report of the Committee on Finance of the Senate. S. Rep. No. 628, 74th Cong., 1st Sess., pp. 14–15.

the reverse. Unemployment reserve funds have the peculiarity that the demands upon them fluctuate considerably, being heaviest when business slackens. If, in such times, the securities in which these funds are invested are thrown upon the market for liquidation, the net effect is likely to be increased deflation. Such a result is avoided in this bill through the provision that all reserve funds are to be held by the United States Treasury, to be invested and liquidated by the Secretary of the Treasury in a manner calculated to promote business stability. When business conditions are such that investment in securities purchased on the open market is unwise, the Secretary of the Treasury may issue special nonnegotiable obligations exclusively to the unemployment trust fund. When a reverse situation exists and heavy drains are made upon the fund for payment of unemployment benefits, the Treasury does not have to dispose of the securities belonging to the fund in open market but may assume them itself. With such a method of handling the reserve funds, it is believed that this bill will solve the problem often raised in discussions of unemployment compensation, regarding the possibility of transferring purchasing power from boom periods to depression periods. It will in fact operate to sustain purchasing power at the onset of a depression without having any counteracting deflationary tendencies.

If the measures adopted by the Congress for the execution of its expressly delegated powers bear a reasonable relation to that end and are not arbitrary or capricious, the decisions of the Congress as to the degree of the necessity for such measures, and the choice of the measures to be adopted, are not subject to judicial review. The mere possibility of the results described above constitutes a reasonable basis for the Congressional determination that the maintenance of such separate funds might impair or obstruct the power of the Federal Government to borrow money, the regulation by the Federal Government of the value of money and of the flow of credit, and the execution by the Federal Government of its monetary and other powers.

The choice of the means of avoiding such interference, so long as such means are not arbitrary or capricious, is within the exclusive domain of Congress. The fact that other means might have been adopted is immaterial. See *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 311; *Stafford* v. *Wallace*, 258 U. S. 495, 521; *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, 423.

Thus, in addition to being a reasonable essential of a workable state unemployment compensation law, the condition requiring the deposit of state-collected contributions in the Unemployment Trust Fund is independently justified as an exercise of the power of Congress to protect the finances and credit of the United States.

III

THE TAX AND CREDIT ARE NOT IN VIOLATION OF THE TENTH AMENDMENT AND ARE CONSISTENT WITH THE PRINCIPLE OF THE DUAL SYSTEM OF OUR GOVERNMENT

Petitioner asserts that even though Title IX be an exercise of the taxing power conferred by Section 8 of Article I of the Constitution, nevertheless it is invalid for two reasons. First, it contends that the tax coerces *individual* action, and thereby effectuates federal regulation of matters not within the power of Congress in violation of the Tenth Amendment. Second, it urges that the tax, by coercing *state* action, violates the fundamental principle that government under the Constitution is dual—that the States must continue to exist and function in certain fields without interference by the Federal Government. We believe that these arguments, severally or in conjunction, are wholly inadequate to sustain petitioner's burden of showing the invalidity of Title IX.

A. The tax and credit do not violate the Tenth Amendment.

Petitioner urges that the tax and credit here involved effectuate the federal regulation of matters not within the power of Congress by resorting to penalties and economic coercion on individuals in violation of the Tenth Amendment. In our opinion it is improper and unnecessary to consider the Tenth Amendment, which does not apply where

Congress acts under a granted power. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330; *United States* v. *California,* 297 U. S. 175; *McCulloch* v. *Maryland,* 4 Wheat. 316, 406. As this Court said in *Everard's Breweries* v. *Day,* 265 U. S. 545, 548:

> And if the Act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the states "powers not delegated to the United States by the Constitution."

But, if the Tenth Amendment has any application to exercises of granted powers, it does not apply here.

1. There are no penalties

The tax has on its face none of the invidious elements associated with a penal law. It must be paid by every taxpayer regardless of his mental attitude. It can never be entirely escaped. This tax cannot be reduced by submission to regulation; a reduction is possible only if a sovereign State enacts an unemployment compensation law, and the taxpayer as a result thereof undergoes a corresponding financial detriment. It does not supplement or perform the function of a state criminal or regulatory law. It is never exorbitant. It is not arbitrary in amount, but varies in direct proportion to the extent that the taxable privilege is utilized.

Nor can it rightly be said that, though the form lacks a penal aspect, the substantial effect is to threaten the taxpayer with a penalty unless the State in which he carries on business enacts a particular type of unemployment compensation law. Clearly, the taxpayer is not penalized if his State fails to enact any unemployment compensation law whatsoever. Under those circumstances he pays no more than does his competitor in a neighboring State which has such a law. He pays to the federal collector of taxes the full amount due under Section 901 of the Social Security Act; while his competitor, as a result of the credit provided in Section 902, pays the same total but divides it so that part of it goes to the federal collector and part to the state agency collecting unemployment contributions.

But it is further said that the taxpayer will be "penalized" if his State should later enact an unemployment compensation law which does not meet the standards set forth in Section 903 (a). He then would be paying more than his competitor in a neighboring State that has a statute complying with that section. If this argument were sound, it would not be open to the petitioner in the case at bar, for it has not been subjected to, nor is it now threatened by the enactment of, a state law which does not meet the standards of Section 903 (a). One who would strike down a statute as unconstitutional must show that the alleged unconstitutional feature injures him. *Premier-Pabst Sales Co.* v. *Grosscup,* 298 U. S. 226; *Hatch* v.

Reardon, 204 U. S. 152, 160, 161; *Massachusetts* v. *Mellon,* 262 U. S. 447; *Virginian Railway* v. *System Federation,* No. 324, October Term 1936, March 29, 1937.

But in any event the argument is unsound. In a number of comparable cases this Court has, without special comment, applied federal tax laws under which deductions were available to persons in some States and not in others. Thus the federal estate tax law formerly required the inclusion of a decedent's real estate in the gross estate only if, under state law, it could be sold to pay expenses of administration. *Crooks* v. *Harrelson,* 282 U. S. 55; *Continental Illinois Bank & Trust Co.* v. *United States,* 65 F. (2d) 506 (C. C. A. 7th), certiorari denied, 290 U. S. 663. Again, the federal income tax on life insurance corporations allowed deductions for reserve funds only if such reserves were required under state laws. *Brown* v. *Helvering,* 291 U. S. 193, 201; *New York Ins. Co.* v. *Edwards,* 271 U. S. 109. And compare *Florida* v. *Mellon,* 273 U. S. 12; *Poe* v. *Seaborn,* 282 U. S. 101; *Rouse* v. *United States,* 65 C. Cls. 749, certiorari denied, 278 U. S. 638.

The foregoing analysis shows that the tax does not fall within the principle that the petitioners derive from the *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; and *United States* v. *Constantine,* 296 U. S. 287. This is plain from a statement of each of these cases.

In the *Child Labor Tax Case* the Court declared unconstitutional a statute imposing an annual excise equivalent to 10 per cent of the entire net profits of any person operating (1) a mine or quarry in which children under the age of 16 years were employed during any portion of the taxable year; or (2) any mill, cannery, or factory in which children under the age of 14 years were employed or where children between the ages of 14 and 16 years had been permitted to work more than 8 hours in any day or more than 6 days in any week, or after 7 p. m. or before 6 a. m. during any portion of the taxable year. Exemption from liability was allowed where the employer reasonably believed the employee to be above the specified age, relying upon a certificate of age issued by a certain board or where the incidence of the tax depended upon the employment of a child under a mistake of fact as to its age and where there was no intention to evade the tax.

Such a statute differs fundamentally from Title IX of the Social Security Act. An essential distinction is that the Child Labor Tax Law offered the taxpayer an opportunity to avoid any out-of-pocket expense if he followed a detailed and specific course of *business* conduct prescribed by the *Federal* Government; whereas Title IX offers a taxpayer virtually no opportunity to avoid out-of-pocket expenses, and allows him to divide such expenses only to the extent he is subjected to *fiscal* demands by a *State* Government. Moreover, the Child Labor Tax Law, unlike Title IX, imposed a tax that was not designed to raise revenue, that depended on *scienter,*[2] that was extremely onerous, and that was not proportioned to the extent to which any privilege was utilized.[3] Title IX merely adapts federal fiscal legislation to a particular type of state fiscal legislation, without penalizing those who are or those who are not subject to such state fiscal measures.

In *Hill* v. *Wallace, supra,* the Court held unconstitutional the Future Trading Act which imposed a prohibitive "tax" upon dealings in grain futures, but exempted transactions on Boards of Trade designated as "contract markets" by the Secretary of Agriculture. Submission to a complex system of regulation was necessary before a Board of Trade could be so designated.

It is plain that the Future Trading Act resembles the Child Labor Tax law, and is essentially different from Title IX of the Social Security Act. Like the Child Labor Tax, but unlike Title IX, the Future Trading Act offered the taxpayer an opportunity to avoid any out-of-pocket expense if the exchanges on which he dealt followed a detailed and specific course of *business* conduct prescribed by the *Federal* Government. The effect of the Future Trading Act was to extend the field of federal control and to penalize those who did not cooperate in effectuating this result. The effect of Title IX is not to enlarge the ambit of federal regulation, nor is it to penalize those who do not follow, or induce others to follow, any particular course of conduct. Indeed, Title IX does not take account even of conduct prescribed under state law, except fiscal conduct of the type which has consistently been taken into account in federal revenue legislation.

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[2] Under the Child Labor Tax law, if the employer did not know that he was departing from the standards of child labor prescribed by the Federal Government, he did not need to pay the tax.

[3] Under the Child Labor Tax law, the 10 percent tax on the net profits for the entire year was payable if but one person under the prescribed age was knowingly employed for one day.

The statute considered in *United States* v. *Constantine, supra,* imposed, in addition to the $25 excise laid on retail liquor dealers by Section 3244, Revised Statutes, a "special excise tax" of $1,000 on such dealers carrying on their business in any State contrary to the laws of such State. In holding this special excise unconstitutional, the Court emphasized (296 U. S. 287, 295) that—

> The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue.

The circumstances in the *Constantine* case were entirely different from those surrounding the tax involved in the case at bar. Here no endeavor is made to penalize unlawful conduct, to discourage employment or to add sanctions for violations of State laws.

2. There is no "economic coercion" on individuals

Petitioner next urges that even though the tax here involved cannot be called a penalty, it is none the less invalid because the credit offered by Section 902 is utilized to exert economic coercion on individuals to bring them within a federal regulatory scheme which Congress is powerless to command. The argument is based on the premise that there are, by virtue of the Tenth Amendment, limits to the broad discretion allowed Congress in the granting of deductions similar to those which have been imposed on the congressional spending power by *United States* v. *Butler,* 297 U. S. 1. This is a wholly novel doctrine, not only unsupported by any direct authority but also contrary to a long-established practice of Congress in tax statutes. However, assuming that the Tenth Amendment might limit some credits, we believe that it does not apply to the credits offered by Title IX, and that the *Butler* case is clearly distinguishable.

Upon analysis of the Act, it is clear that the taxpayer is offered no inducement which restricts his voluntary choice. If he lives in a State which has no unemployment compensation law he is not offered a reward if his State does pass such a law. He is merely told that some of the money which he would otherwise be required to pay to the Federal Government he will then be allowed to pay to his State. His out-of-pocket expenses remain roughly the same. Of course, the knowledge of the tax and the available deductions may remove an important objection that he would otherwise have to a local unemployment compensation law, namely, the fear that such a law would impose on him a burden for which his competitor in a sister State had no rough equivalent. This new freedom from competition, however, is negative in character. The taxpayer, like the States (see p. 101 *et seq., infra*) is merely enabled under the Act to favor or oppose unemployment compensation on its merits, free from the fear of devastating competition.

But it is argued that the act restricts the free choice of a taxpayer who is undecided whether to favor the enactment of an unemployment compensation law which meets the description in Section 903 (a) or one which does not. Actually his choice is not truly fettered. We have pointed out above (pp. 71–77, *supra*), that the provisions of that section are solely definitional, and do not affect the major issues in such a law which the citizens of each State may resolve in their own way. Section 903 (a) is not a limitation, but a provision by which Congress could insure that the credits against the federal tax were payments made under a *bona fide* State unemployment compensation law.

Thus it appears that the situation at bar is entirely different from that in the *Butler* case. In the Agricultural Adjustment Act excises were levied upon processors of cotton, and the proceeds, or amounts equivalent thereto, were used by the Government to offer substantial benefit payments to cotton farmers who executed contracts by which the Federal Government directly regulated the production on their individual farms. The Court held that the taxes were invalid because the proceeds were used to coerce farmers to accept regulatory contracts by which Congress purchased compliance that it was powerless to command. It was not the mere expenditure of federal money which the Court found coercive, but the form of the offer and the form of the regulation. First, the Court pointed out that the competitive situation was such that cotton farmers had no genuine option but were forced to accept the regulatory scheme outlined. Mr. Justice Roberts said (297 U. S. 1, 70–71):

> The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. *The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation.* The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to

> undersell him. *The result may well be financial ruin.* [Italics added.]

Then the Court noted that the Government gave the money not upon conditions, but only upon *contracts* which gave the Government actual legal control of the farmer's production. In a significant passage (297 U. S. 1, 73), Mr. Justice Roberts recognized that the firm commitment and legal sanctions involved in a contract exercised coercion, whereas the loose inducement involved in a conditional gift might not:

> We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with the appropriation shall no longer be available. By the Agricultural Adjustment Act the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. *There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced.* [Italics added.]

Finally, the Court observed that the regulations effected by the proceeds of the taxes was direct federal regulation. Under the contract the State did not regulate; the regulation was federal and the State could not object, "declare the contract void and thus prevent those under the state's jurisdiction from complying with its terms." 297 U. S. 74.

None of these coercive factors exists with respect to the tax credit offered by Section 902. There is no competitive or other situation which makes the proffered credit an irresistible financial inducement or, indeed, a financial inducement of any sort. The Federal Government asks for no contract or other tie which firmly commits any person or any State to any course of conduct. And whatever regulation may eventually occur will be state regulation, which a State is free to favor or to oppose; to inaugurate or prevent.

It is noteworthy that under the Agricultural Adjustment Act the Federal Government retained control of the object for which the expenditure was made after the disbursement of Federal money had been completed. Thus the disbursement became a mere instrument of control of local matters. *Here the conditions on which the credit is allowed are directed solely at insuring that it shall be given only for the object for which it is to be allowed, viz., payments under a genuine unemployment compensation law.* Thus, if the conditions be considered as regulatory in nature, they constitute regulation only to the extent of insuring that the credit granted is utilized for the intended purpose. They are, in other words, identical with conditions on the disbursement of money which are designed to insure that the money reaches the intended recipients. Once the conditions have been fulfilled, the credit continues automatically and no Federal control whatever is exercised.

3. Title IX is not a means for effectuating the Federal regulation of matters not within the powers of Congress

Petitioner may assert that even if Title IX does not involve penalties or coercion, it violates the Tenth Amendment because it endeavors to effectuate the federal regulation of matters not within the powers of Congress. It is said that under this Title Congress is either regulating directly the local relationship of employer and employee, or is dictating the form of a state regulation of the local relationship of employer and employee.

A. UNDER TITLE IX CONGRESS DOES NOT DIRECTLY REGULATE THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE

The first half of this charge is so plainly unfounded that it requires only brief attention. Under the Social Security Act, Congress is not regulating the local relationship of employer and employee. Neither in that nor any other statute[4] has Congress established an unemployment compensation system to operate in any State. If an unemployment compensation system is established in a particular State, the regulation of employer and employee thereby accomplished will be by state law, not by federal law. It will be the State, not the United States, which will tell employers and employees how much they shall contribute, if at all. It will be the State, not the United States, which will tell the unemployed which of them shall be paid benefits, when they shall receive these benefits, and how much the benefits shall be.[5] Even in these minor respects where the state law conforms to the descriptive features of Section 903 (a), discussed at pp. 71–77, *supra,* the regulation both in form and in substance will be state regulation, which the United States does not command, and which is accomplished by state law operating *ex proprio vigore.*

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[4] Congress has established an unemployment compensation system for the District of Columbia. Act of Aug. 28, 1935, c. 794, 49 Stat. 946. This system, however, is strictly limited to an employment the greater part of which is performed within the District of Columbia. Sec. 1 (b).

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[5] The House Report, Report No. 615, p. 8, emphasizes the point that "The bill permits the States wide discretion with respect to the unemployment compensation laws they may wish to enact." And Senate Report No. 628 is equally emphatic. It is there noted that (pp. 12, 13):

"This bill does not set up a Federal unemployment compensation system. What it seeks to do is merely to make it possible for the States to establish unemployment compensation systems and to stimulate them to do so.

* * * * *

"Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington. The States may or may not add employee contributions to those required from the employers. Of the 5 States which have thus far enacted unemployment compensation laws, 2 require employee contributions, and 3 do not. Likewise, the States may determine their own compensation rates, waiting periods, and maximum duration of benefits. Such latitude is very essential because the rate of unemployment varies greatly in different States, being twice as great in some States as in others."

Thus the situation is entirely different from that in the cases upon which petitioner relies. In each of them the regulation was both in form and in substance directly federal. In the Bituminous Coal Conservation Act considered in *Carter* v. *Carter Coal Co.,* 298 U. S. 238, the hours, wages and other working conditions in the bituminous coal industry were regulated under a federal code. In the live poultry code under the National Industrial Recovery Act, reviewed in *Schechter Corp.* v. *United States,* 295 U. S. 495, the fair trade practices and working conditions in the live poultry industry were subjected to federal regulations. The contracts made pursuant to the Agricultural Adjustment Act, considered in *United States* v. *Butler,* 297 U. S. 1, set up a system whereby the Federal Government directly controlled the individual farmer's production. The Municipal Bankruptcy Act, invalidated in *Ashton* v. *Cameron County Water Dist.,* 298 U. S. 513, resulted in making state instrumentalities directly subject to the supervision of federal courts.

B. UNDER TITLE IX CONGRESS DOES NOT INDIRECTLY REGULATE THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE

Petitioner, however, says that the distinction we draw between the Bituminous Coal Act, the National Industrial Recovery Act, the Agricultural

Adjustment Act, and the Municipal Bankruptcy Act, on the one hand, and Title IX of the Social Security Act, on the other hand, is a distinction of form and not of substance. It says that here the regulation of employer and employee may in form be accomplished by state laws, but none the less is in substance federal regulation.

But the mere fact that Congress in the exercise of a federal power takes into account the existence of local regulatory measures does not transform these measures into national regulations. It is a commonplace that in exercising its taxing and other powers, Congress frequently takes into account the burden and nature of local regulation. Thus the federal estate tax laws have taken into account local rules regarding the extent to which a decedent's real estate is subjected by local law to administration expenses, *Crooks* v. *Harrelson,* 282 U. S. 55, and local laws regarding succession taxes, *Florida* v. *Mellon,* 273 U. S. 12; the federal income tax laws have taken into account local rules regarding community property, *Poe* v. *Seaborn,* 282 U. S. 101, and local laws regarding fraudulent conveyances, *Phillips* v. *Commissioner,* 283 U. S. 589, 602; the federal bankruptcy laws have for many years allowed exemptions on the basis of local regulatory legislation, *Hanover National Bank* v. *Moyses,* 186 U. S. 181; cf. *Wright* v. *Vinton Branch of the Mountain Trust Bank of Roanoke,* No. 530, October Term, 1936, March 29, 1937; and the federal power to regulate commerce has been so exercised as to take into account local liquor regulations, *In re Rahrer,* 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311, and local labor regulations, *Whitfield* v. *Ohio,* 297 U. S. 431.

In taking state laws into account, as cases like *Crooks* v. *Harrelson, Florida* v. *Mellon,* and *Poe* v. *Seaborn, supra,* show, the Federal Government is not in any sense dictating regulations. One might as well assert that Congress regulates marriage when it allows a greater deduction from income tax to one who has been married than to another who has not, Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 25 (b) (1); or that Congress regulated corporations when, while exempting enterprises conducted as a partnership, it taxed similar enterprises conducted under corporate franchises granted by state law. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158. To draw such distinctions on the basis of state regulations is not to regulate but to *classify.* See pages 67, 71–77, *supra.*

And the classification here is no more meticulous and detailed and no more coercive or regulatory than in the cases cited. Congress has merely taxed those who are subject to a genuine state unemployment compensation law differently from those who are not. The provisions of Section 903 (a) can properly be construed in no other way.

B. The tax and credit do not constitute a violation of the principle of the dual system of Government

We have shown that there is no substance to the assertion that the tax and credit here involved constitute a violation of the Tenth Amendment, since Congress has not attempted either directly or indirectly to impose a system of regulation of local relationships within the States. There remains to be considered the charge that the tax and credit constitute a violation of the fundamental principle of the dual nature of our system of federal and state governments. We submit that the tax and credit do not violate this principle, that no burden is laid on the States and that there is no coercion on them to adopt a course of action in a field reserved to them by the Constitution, and that the method here adopted has been expressly sanctioned by this Court.

The principle of the indestructible nature of our dual system of government finds clear expression in *Collector* v. *Day,* 11 Wall. 113, 124:

> The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "re-

> served", are as independent of the general government as that government within its sphere is independent of the States.

Hence it follows that a federal tax on essential governmental functions of a State must of necessity be invalid.

However, the principle has never been applied to denounce action either by the States or by the Federal Government through which greater cooperation between them can be secured. Abundant examples might be drawn from many varied fields of state and federal action, particularly with respect to grants by the Federal Government in aid of various activities of the States (see pp. 130–135, *infra*). The Webb-Kenyon Act, which involves cooperation under the commerce clause, is a striking illustration. By that Act (Act of March 1, 1913, c. 90, 37 Stat. 699) Congress prohibited the shipment in interstate commerce of liquor which was to be sold or used in violation of any state law. This Court, sustaining the Act in *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311, clearly pointed out that any argument was fallacious which required the conclusion (p. 331)—

> that because Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the local and national forces of government to the end

> of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution.

Cf. In re Rahrer, 140 U. S. 545; *Rhodes* v. *Iowa,* 170 U. S. 412; *Whitfield* v. *Ohio,* 297 U. S. 431; *Hanover National Bank* v. *Moyses,* 186 U. S. 181; *Poe* v. *Seaborn,* 282 U. S. 101.

It is the position of the Government that the tax here falls within the latter, rather than the former, category—that it is cooperative rather than coercive. Freedom of action by the States is not limited by Title IX. On the contrary, it is actually increased.

1. The tax levied by title IX increases, rather than decreases, the freedom of State action.

Prior to the passage of Title IX of the Social Security Act, a State, by enacting an unemployment compensation law, might seriously have prejudiced its domestic producers by causing them to lose their outside as well as their home markets to outside competition. Not only were the States powerless to act with reference to their outside markets, but, by reason of the commerce clause, it was impossible for them to act, either individually or collectively, to prevent the importation of goods from other States, the producers of which had borne no unemployment compensation expense. *Baldwin* v. *Seelig,* 294 U. S. 511. Economic conditions, in other words, blocked *in limine* the States' freedom to evaluate the merits or demerits of unemployment compensation.[6] See footnote 69, page 25, *supra*.

This restrictive factor—the economic coercion of the commerce clause—is effectively eliminated by the Social Security Act. Employers in every State are subject to a uniform federal tax, and no additional financial burden need be imposed on them by passage of a State unemployment law which meets the requirements of section 903, because ~~the amount~~ of the state contribution can be credited up to 90 percent of the amount of the federal tax.[7] A State may, therefore, still refrain from the enactment of unemployment compensation legislation. However, it now has an alternative which did not before exist, namely, to enact an unemployment compensation law without imposing upon its citizens a burden greater than that borne by their competitors in the neighboring State having no similar law. Yet the out-of-pocket expense to the employers in a State is made no less by the failure of the State to act. Under the Act the States pass upon unemployment compensation in accord with their individual opinion of its value, unhampered by the fear of ruinous competition from their neighbors.

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[6] This situation was commented upon by both the Finance Committee of the Senate and the Ways and Means Committee of the House in reporting the Social Security Act. The report of the former states (S. Rep. No. 628, 74th Cong., 1st Sess., p. 16):

"Unemployment compensation in this country has been long delayed. The principal explanation is that the States have not been able to establish unemployment-compensation laws because, in doing so, they would have been compelled to handicap their industries in competition with those of other States not having such laws. Under the plan proposed in this bill, this handicap will be removed, and it will be possible to set up unemployment-compensation laws through State action."

See also H. Rep. No. 615, 74th Cong., 1st Sess., p. 8.

[7] If a state law provides for a contribution equivalent to the federal tax, an increase of 10% in the tax burden results from the fact that the credit against the federal tax is limited to 90 percent. (Section 902.) Actually a State may avoid even this slight additional burden by a law imposing a contribution amounting to 90 percent of the federal tax, or less, so that all of it may be credited. See, *e. g.*, Massachusetts General Laws (Ter. Ed.), ch. 151A, Sec. 3 (a). This device has been adopted by many States in their estate or inheritance tax laws to take advantage of the similar credit allowed by the federal estate tax.

In this respect the effect of the legislation here under consideration is closely akin to that of the statute prohibiting the transportation of prison made goods into any State prohibiting the sale of such goods, recently before this Court in *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, No. 138, October Term, 1936, January 4, 1937. There Congress "put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy." So here, Congress has put forth its power to tax for the same end, as well as to carry out the objective entrusted under its power to tax and provide funds for the general welfare.

Of special significance as showing the cooperative character of the statute at bar is Section 906, which permits the States to require payments to an unemployment compensation fund to be made by persons engaged in interstate commerce. Were no such provision made by Congress, perhaps the States would be unable to tax employers engaged in interstate commerce or to levy a tax with respect to employees engaged in such commerce. Insuperable administrative difficulties might well be encountered by the States in attempting to distinguish between the local and interstate employees in particular enterprises. Congress has thus aided the States not only by equalizing competitive disadvantages among employers in the various States, but also by removing the practical administrative barriers to state action caused by constitutional prohibitions against laying tax burdens on interstate commerce. Here Congress has acted as it did in permitting States to tax national banks shares (Section 5219, Revised Statutes; *Van Allen* v. *The Assessors,* 3 Wall. 573), or in permitting application of state prohibitory laws to goods in the original package. *Whitfield* v. *Ohio,* 297 U. S. 431.

Striking evidence of the lack of coercion of the federal statute is the fact that two States have declared through their highest courts that they did not consider themselves coerced by Title IX into passing their legislation. *Howes Bros.* v. *Massachusetts U. C. Comm.,* (Mass Sup. Jud. Ct., December 30, 1936), 5 N. E. (2d) 720; *Gillum* v. *Johnson,* (Calif. Sup. Ct.), 62 P. (2d) 1037. In addition, several States have refused to pass unemployment compensation laws and have preferred to have their citizens continue to pay the full tax levied by Title IX.[8]

It may be objected that even though a State may now be able to enact unemployment compensation legislation without economic prejudice, nevertheless its course of conduct is dictated in advance because to take advantage of the new alternative presented it must enact legislation complying with the requirements of Section 903 (a). Actually, although it is true that the credit is available only if the requirements of Section 903 (a) are met, that fact is of negligible consequence in limiting the freedom of State action in enacting unemployment compensation laws. The requirements have already been considered at length in our discussion of their propriety under the Fifth Amendment (pp. 71–77, *supra*). It is quite evident from that discussion that they do not limit a State to any particular type of unemployment insurance; rather, they are primarily designed to insure that no deduction be taken under a state law which does not in fact establish a state unemployment compensation system.[9] In other words, they constitute an enumeration of the prerequisites to any plan of unemployment compensation properly so called.

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[8] Thus the legislature of Illinois has several times rejected bills to provide a state unemployment compensation system. Similarly the legislature of Delaware has rejected such a bill.

[9] The one provision of Section 903 (a) which does not fall entirely within this category is subdivision (3), which provides that all money received in the unemployment fund shall

Brief reference to the different types of unemployment compensation which a State might establish,[10] and the major issues under each of the types which each State must work out in its own way, will show clearly that Section 903 (a) cannot properly be construed as a limitation upon the right of a State to establish whatever plan of unemployment compensation it regards as most desirable.

There are, in general, three main types of unemployment compensation which a State may enact. The first type is a pooled unemployment fund, in which all contributions are commingled and from which payments of compensation are made to unemployed workmen without reference to the employer for whom they had worked. In connection with such a fund, a separate bookkeeping account may be kept for each employer, showing what he contributes and what his workmen draw, and reduced rates, known as merit ratings, may in time be allowed for employers whose records merit such treatment. This type of law is in effect in Alabama, California, New York and several other

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immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund of the State. This provision has also been discussed at pp. 77–82, *supra*.

[10] A tabular representation of the chief features of the various state unemployment compensation laws will be found in a chart inserted at the end of the Appendix.

States. Most of these state laws provide for merit ratings.

A second type of unemployment compensation is a system of unemployment reserve acounts. In this type, each employer makes his contributions into a specially segregated account, and each workman, when he becomes unemployed, must look for compensation to the particular unemployment reserve account accumulated by his former employers. Usually, the law provides that an employer may, after his account has accumulated to a certain point and has shown ability to withstand the drain of benefit payments, contribute at a reduced rate, or not at all. This plan is in effect in Wisconsin, and, together with a system of partial pooling, in Indiana, Oregon, and Kentucky.

A third type provides for guaranteed employment accounts. By this plan, an employer undertakes to give a certain minimum period of employment during the year to each of his employees, and at the same time contributes to an account or fund which can be drawn on by any of his employees as to whom the guaranty is not fulfilled or renewed. The plan usually provides that an employer who has fulfilled his guaranty in the past shall in the future either not contribute or contribute at a reduced rate. This plan is in operation in connection with a plan of pooled funds or a plan of unemployment reserve accounts in California, Idaho, Indiana, Minnesota, Oregon, and Wisconsin.

Not only have the States complete independence with respect to the major type of plan, or combinations of any of them, which they desire to adopt, but also they may fill in the scheme with such details as they may believe best. Within the framework of the three main types of systems above described there are now in effect eleven different variations with respect to the type of fund. The size of the firm covered shows twelve variations, ranging from employers of one or more at any time, in the District of Columbia, and employers of one or more within any 20 weeks of the year, in six States, to employers of eight or more within any 20 weeks, in twenty-three States. Types of employment which may be specifically included or excluded are completely within the discretion of the States. For example, five States exclude insurance agents, although the labor of such persons comes within the definition of employment in Title IX, and New York includes domestic service and maritime service, which are excluded from the Federal Act.

Contributions and benefits are likewise determined by the States. Employers alone may be required to contribute, as the New York act provides; employers and employees may both be included as in California, or the State may itself contribute in addition to either of the above schemes as in the District of Columbia. Contributions may be subject to future increase or reduction upon the basis of merit ratings as in most present state acts, or there may be no such variation, as in the acts of Massachusetts, Mississippi, New York and Rhode Island. The amount of the benefits, the variations for total and partial unemployment, the maximum and minimum periods during which benefits shall be paid, the weight, if any, to be given to the length of the prior employment, and the provisions for seasonal workers are all problems which the States have solved for themselves and in the solution of which the widest variety is found. The same is true of the conditions imposed upon the receipt of benefits—the employment qualifying period, the waiting period, and all the various disqualifications which may be found desirable by any State. For example, a State is free to impose or not to impose a "means test" as a condition to the payment of compensation. All the details of administration are subject to the same discretion, such as the appeals procedure and the agency under which the law is administered.

Had Title IX been intended as a statute to regulate the type of laws which were to be enacted by the States, compliance with the type of unemployment compensation law which Congress preferred, and its best judgment on the details, would have been made prerequisites to the deductions. This has not been done. The decision upon all these matters has been left to the States. The requirements of Section 903 (a) go no further than to require that the law which exacts contributions for which credits are allowed shall in fact be an unemployment compensation law, and not something different masquerading under that title.

We have discussed the various provisions of Section 903 (a) in some detail earlier (*supra*, pp. 71–77). At this point attention may be directed to the provisions of Paragraph (5) of this Section, since it may be charged that these provisions, in effect, coerce the States into the adoption of labor relations acts and hence interfere with their internal policy. Paragraph (5) requires that compensation be not denied any otherwise eligible individual for refusing to accept new work if (A) the position offered is vacant due directly to a labor dispute, (B) the wages, hours, or other conditions of employment are substantially less favorable to the individual than those prevailing for similar work in the locality, or (C) the individual is required to sign a yellow-dog contract as a condition of employment.

The appropriateness of Clause (B) is obvious. A genuine unemployment compensation law must include a standard for determining the suitability of new work, since it is manifest that benefits should not be denied to a man who refuses unsuitable work. The simplest test of suitability, which depends upon external evidence rather than an exercise of individual judgment, is that the wages, hours, and other conditions of employment shall not be substantially less favorable than those prevailing for similar work in the locality.

The conditions contained in clauses (A) and (C) are similarly appropriate criteria of the genuineness of an unemployment compensation law. The refusal to pay unemployment benefits to a man who refuses to engage in strike-breaking activities or to sign a yellow-dog contract would amount to employing a purported unemployment compensation law as a weapon in industrial controversy, and would at the same time operate to increase the burden on the federal treasury for relief of the persons thus denied unemployment compensation.

The charge that these provisions constitute the imposition of a labor policy on the States is without substance. There is no requirement, express or implied, that a State should provide benefits for workers on strike. Indeed, some States have specifically denied benefits to strikers. *E. g.,* Massachusetts General Laws (Ter. Ed.), Ch. 151A, Sec. 19a. There is no requirement, express or implied, that the States outlaw the yellow-dog contract or enact legislation protecting collective bargaining. A State may take any position it desires towards yellow-dog contracts. It should do so, however, through appropriate legislation designed for that purpose and not through an unemployment compensation law. Far from imposing an alien policy upon the States, Congress has acted so as to insure that the granting of the credit will not result in the perversion of an unemployment compensation system into an instrument for carrying out some other policy which the State may, if it desires, carry out through other legislation entirely within its own control. The conditions of Section 903 (a), instead of making Title IX a disguised labor relations act, are designed to prevent a credit being given for a supposed unemployment compensation law which is in fact a disguised labor relations act. Moreover, as we have shown, the conditions of Section 903 (a) are clearly separable from the remainder of the Act.

We submit, therefore, that the tax levied by Title IX can in no proper sense be considered as compelling the States to take any action, much less action of a particular sort. On the contrary, we believe that when accurately evaluated it is a means by which the economic factors which in the past have prevented State action are removed, leaving the States with a new freedom to enact unemployment compensation legislation of any type they may individually believe best suited to their local conditions.

2. *Even if the tax levied by Title IX be considered as a factor which makes it more desirable for a State to enact an unemployment compensation law, nevertheless its validity is established by decisions of this Court*

We believe that the foregoing argument constitutes a complete answer to petitioner's contention that the tax here involved is designed to coerce state action. But, alternatively, we submit that to apply the term "coercion" to any possible inducement which may be spelled out by petitioner is to go not only far beyond any proper definition of the term, but also contrary to the decisions of this Court.

The chief basis upon which petitioner rests his claim of state coercion is the allegation that economically, a State is forced to allow its citizens to take advantage of the 90% credit against the Federal tax.

It must certainly be true that only in rare and exceptional circumstances will a tax be rendered invalid by a credit or a deduction. Every credit and deduction exercises a certain amount of pressure, inducing persons to act in ways they might not otherwise select and which Congress is quite powerless to command. Illustrations are abundant, but specific reference may be made to the deductions offered to life insurance companies by the Revenue Acts of 1921 and 1924 (Secs. 244, 245), which undoubtedly induced the companies to subject themselves to levies which Congress could not have required. *Helvering* v. *Independent Life Insurance Co.,* 292 U. S. 371, 380, 381. Again, the deduction from gross income for charitable contributions has undoubtedly a tendency to induce more liberal gifts. The pressure must be strong indeed to require a holding that a credit or deduction will invalidate a tax.

Hitherto this Court has held that a tax is coercive where its burden can be avoided by submission to a system of regulation prescribed by Congress. *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44. In these cases the coercion existed by reason of the fact that the tax burden constituted an overwhelming inducement to adopt an alternative course of conduct which the Federal Government could not otherwise have prescribed. The result may be the same where the coercive effect of the tax burden operates to compel alternative action by the State in order to relieve the citizens of the State of a financial burden. An example would be a tax imposed on employers with an exemption in favor of employers in those States which had passed laws prohibiting child labor. Such a tax would perhaps stand on the same footing as the tax condemned in the *Child Labor Tax Case, supra.*

The tax and credit at bar are far different from such prohibited exactions. A State which enacts an unemployment compensation law does not give its citizens occasion to avoid the tax burden, since the taxpayer pays precisely the same amount whether there be a state law or not. If any inducement be held out to the State it is certainly not the inducement to submit to regulation as the price of escaping a crushing burden. At the most the State will find it advantageous to enact its own unemployment compensation law if it considers it desirable to provide systematic relief against unemployment. If it does not care to do so, it can suffer little, if any, detriment, since the tax burden on its citizens remains the same, and since the relief of its unemployed will, in all probability, still be undertaken in large part by the Federal Government.

(See footnote 74, p. 27, *supra.*)[11] Consequently where a State does set up its own unemployment compensation system the pressure exerted upon it by the credit provided in the federal act is no greater, and perhaps even less, than the pressure exerted by a grant in aid such as that considered in *Massachusetts* v. *Mellon,* 262 U. S. 447. If the Federal Government had made grants in aid to the States to be distributed by the States under unemployment compensation laws enacted by them, the answer to any charge of coercion would have been that given by Mr. Justice Sutherland in the case cited (p. 482):

> Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

Lastly, it is to be observed that whatever the degree of inducement may be, it is only an inducement with respect to fiscal legislation, to accomplish an end which could otherwise be accomplished by the spending power of the Federal Government. If a State can be said to be induced to set up an unemployment compensation system it is induced to undertake the relief of its unemployed who would otherwise be a charge on the Federal Government. Since the Federal Government, as we have shown earlier, is enabled under its power to appropriate for the general welfare to spend money for the relief of the unemployed, it cannot be said that it has gone beyond its power if it enacts legislation inducing the States to make expenditures for this same purpose. We have shown earlier that the Constitution permits the Federal Government to ~~require~~ encourage contributions to be made directly by the treasuries of the individual States for purposes within the federal spending power. (*Supra*, pp. 53–57.) The case is but little different where the Federal Government acts by way of inducement to bring about the raising and expenditure of moneys for the same purposes within the States.

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[11] A State which enacts an approved unemployment compensation law receives the benefits of grants to aid in the expenses of administering its law under Title III, but as we shall show later these benefits are but slight and incidental inducements and do not constitute an integral part of the system. See *infra,* pp. 124–127.

It will be readily seen that the power here exercised, if it amounts to an inducement to the States to adopt some course of action, only induces fiscal action for a purpose for which the federal spending power is now being exercised. The power thus carries its own inherent limitations and could not conceivably be extended so as to invade the reserved field of the States or to destroy the dual system of government.

It is unnecessary to argue in the abstract about degrees of inducement, however, for there is a direct precedent which completely answers petitioner's contention. Section 301 of the Revenue Act of 1926 imposes a tax upon the transfer of a decedent's estate, while at the same time permitting a credit, not exceeding 80 percent for "the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory." The large credit granted thereby not only has the effect of reducing substantially the federal revenues, but also operates to remove the incentive for wealthy persons to move to States having no death taxes, and induces such States to levy death taxes.

The State of Florida challenged those provisions in *Florida* v. *Mellon,* 273 U. S. 12. Florida itself had no inheritance taxes and alleged that under its constitution it could not levy any. 273 U. S. 12, 15. Indeed, by abolishing inheritance taxes, it had hoped to induce wealthy persons to become its citizens.[12] See 67 Cong. Rec., Part 1, pp. 735, 752. In this Court, Florida contended that "The Estate Tax provision was not passed for the purpose of raising federal revenue" (273 U. S. 12, 14), but rather "to coerce States into adopting estate or inheritance tax laws." 273 U. S. 12, 13.[13] In fact, as a result of the 80 per cent credit, 36 States did materially change their inheritance tax laws and 3 amended their constitutions. See Perkins, *State Action under the Federal Estate Tax Credit Clause,* 13 North Carolina Law Review, 271. Yet this Court found no difficulty in sustaining the validity of those provisions. The case did, it is true, involve a jurisdictional issue, but the Court also passed upon the merits of the controversy, stating that "the act assailed was passed by Congress in pursuance of its power to lay and collect taxes, and * * * must be held to be constitutional." 273 U. S., p. 17. The decision has, in fact, been cited several times as a holding upon the merits. See *Poe* v. *Seaborn,* 282 U. S. 101, 117–118; *Phillips* v. *Commissioner,* 283 U. S. 589, 602. In any event there can be no doubt as to the constitutionality of the federal estate tax. See *Rouse* v. *United States,* 65 C. Cls. 749, certiorari denied, 278 U. S. 638. *Cf. Porter* v. *Commissioner,* 288 U. S. 436; *Helvering* v. *City Bank Co.,* 296 U. S. 85.

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[12] Cf. H. Rep. No. 1, 69th Cong., 1st Sess., p. 15.

[13] It may be pointed out that Congress seriously considered repealing the estate tax entirely at that time. After the House had passed a bill providing for an 80 percent credit, the Senate Committee on Finance recommended repeal of the entire estate tax law, it being stated that: "The application of the 80 percent provision, together with the cost to the Government of collecting the remaining 20 percent does not justify the retention of this tax." S. Rep. No.

We submit that the decision in *Florida* v. *Mellon, supra,* is conclusive in this case, and that the tax levied by Title IX is not, properly considered, a coercive act, but one which increases, rather than decreases, the freedom of the States to act. If, however, the Court believes that inducement, to a

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52, 69th Cong., 1st Sess., p. 8. The Senate thereupon passed a bill repealing the estate tax. In conference, the Senate receded from its position. H. Rep. No. 356, 69th Cong., 1st Sess., pp. 7–24.

degree, is offered, nevertheless the tax is not rendered invalid thereby.

IV

THE GRANTS IN AID TO THE STATES UNDER TITLE III DO NOT AFFECT THE VALIDITY OF THE TAX IMPOSED BY TITLE IX

We have shown above that the tax imposed by Title IX is a valid exercise of the powers of Congress under Article I, Section 8, Clause 1 of the Constitution, and that its character as a tax is not destroyed or affected by reason of the credits allowed under Section 902. We have also shown that, as such an exercise of the taxing power, Title IX does not violate either the Fifth Amendment, the Tenth Amendment or impair the dual character of our government.

Petitioner, however, alleges that even assuming that Title IX, standing alone, would be valid, nevertheless the presence of Title III of the Act, under which Congress has authorized an annual appropriation of $49,000,000 "for the purpose of assisting the States in the administration of their unemployment compensation laws" renders Title IX unconstitutional. Petitioner argues that even assuming that Congress framed the tax under Title IX to raise large revenues, Congress intended to use these funds to finance the grants-in-aid under Title III, and that this purpose robbed the tax under Title IX of its true tax character because a tax can be laid for general revenue only and a tax laid for a particular purpose is no tax at all. Moreover, petitioner alleges that even if a tax may be laid to raise revenue for a particular purpose, the tax is bad if the purpose is an improper one, and the purpose here—subventions to the States for expenses of administration of unemployment compensation laws—is improper.

We believe that Title III is wholly immaterial for purposes of the present suit. First, Title III is wholly distinct from Title IX, and for that reason need not be considered. Moreover, even if it be considered, we submit that the grants are, in all respects a constitutional exercise of the power of the Federal Government to spend money to provide for the general welfare, and that a tax may therefore be levied in order to raise the money to make those grants.

A. Title III is in fact and in law wholly separate from Title IX, and need not, therefore, be considered

1. Title III is, as a matter of fact, unrelated to Title IX

Section 905 (a) of the Act provides that the tax imposed by Title IX "shall be collected by the Bureau of Internal Revenue * * * and shall be paid into the Treasury of the United States as internal-revenue collections." The proceeds are not nominally or in substance set aside for any particular purpose, or earmarked in any way, but are, along with the proceeds of other taxes, mingled in the general funds of the United States Treasury.

Petitioner, however, argues that the proceeds are, in some way, related to Section 301 of the Act, which provides:

> For the purpose of assisting the States in the administration of their unemployment compensation laws, there is hereby authorized to be appropriated, for the fiscal year ending June 30, 1936, the sum of $4,000,000, and for each fiscal year thereafter the sum of $49,000,000, * * *.

The statute itself obviously does not in any way relate the revenues to be derived under Title IX to the contemplated expenditures under Title III. Taxpayer, therefore, is faced with the heavy burden of proving that there should be read into the Act a direct relation between these two titles. We submit that if the Court wishes to go behind the face of the Act, it is apparent from various factors that Congress did not intend that the Title IX revenues and the Title III expenditures should be related.

At the outset it should be noted that Title III makes no actual appropriation of the amounts specified in Section 301. It merely authorizes future appropriations for the purposes there specified,[14] but those appropriations may never be made at all, or may be wholly different in amount. Actually, of the $4,000,000 authorized to be appropriated for the fiscal year ending June 30, 1936, only $2,250,000 was appropriated,[15] and of the $49,000,000 authorized for the next fiscal year only $29,000,000 was appropriated.[16] These appropriations were made long before the due date of the tax imposed by Title IX.

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[14] The authorization has no legal effect except compliance with Rule XXI, clause 2, Jefferson's Manual and Rules of the House of Representatives.

Furthermore, even if the $49,000,000 authorized to be expended by Section 301 be accepted as a criterion of probable appropriations, it is plain that there is no equivalence between that amount and the proceeds of the Title IX tax. The rate of tax under Title IX changes from 1 percent for the first year to 2 percent for the second and 3 percent for the third, but the appropriation remains constant at $49,000,000. The estimated revenues, even if it be assumed that all employers become entitled to the 90 percent credit, will range from $20,000,000 for the first year to over $90,000,000 for the year 1950.[17] Moreover, as States enact unemployment compensation laws, and more employers thus become entitled to the 90 percent credit, the revenues under Title IX will decrease, while *pari passu* expenditures under Title III will increase. But even if all States eventually adopt unemployment compensation laws and all employers become entitled to the 90 percent credit, the revenues from

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[15] Act of February 11, 1936, c. 49, 49 Stat. 1109, 1113.

[16] Act of June 22, 1936, c. 689, 49 Stat. 1597, 1605.

[17] See footnote 82, p. 42–43, *supra*.

Title IX will far exceed the appropriations authorized under Title III.

The most that can be said is that Congress realized that the operation of the Social Security Act would require the expenditure of federal funds and therefore made provision for raising additional revenue for the general support of the Treasury. But this does not mean that the proceeds of this particular tax will be used in making the expenditures under Title III. As in *Frothingham* v. *Mellon,* 262 U. S. 447, the taxpayer's interest in the appropriation from the general funds is too remote and indefinite to give him any standing to question the expenditure. See also *Knights* v. *Jackson,* 260 U. S. 12, 15.

United States v. *Butler,* 297 U. S. 1, is not contrary to this conclusion. The sole object of the Agricultural Adjustment Act was "to restore the purchasing power of agricultural products" (p. 58), and the entire proceeds of the tax were appropriated in aid of crop control (p. 59). "A tax automatically goes into effect * * * when the Secretary of Agriculture determines that rental or benefit payments are to be made * * *. The tax is to cease when rental or benefit payments cease." (*Ibid.*) None of the revenue was made available for general governmental use (*Ibid.*). None of these striking correlations are present in the instant case; rather, it is governed by the rule of *Frothingham* v. *Mellon,* 262 U. S. 447.

2. Titles IX and III are legally separable

Even if Title III were related in fact to Title IX, its validity is immaterial in the present case since it is, in law, clearly separable from Title IX, and should not, therefore, now be considered.

Section 1103 of the Act provides:

> If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances shall not be affected thereby.

While the separability clause does not constitute an inexorable command, it creates a strong presumption that one invalid portion of the statute will not cause it all to fall. The presumption can be overcome only by considerations which establish "the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains" (*Williams* v. *Standard Oil Co.,* 278 U. S. 235, 242), or, as the same principle is expressed in *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184–185, by evidence showing "the clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part." See *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 312–313. We submit that not only is there no clear evidence of such an intention on the part of Congress, but rather that the evidence indicates that Title IX was intended to be legally distinct from Title III.

There can be no doubt that Title IX can operate alone as a complete and workable taxing statute. It fixes the rate of tax, its subject, provides for certain credits, and establishes a procedure for its collection. And it is in no sense dependent upon Title III. The fact that Title III does not actually appropriate any funds; the absence of relation or equivalence between estimated revenues and even authorized appropriations; the mingling of the funds derived from Title IX with the general revenues of the Government and the appropriation of the grants in Title III from the general funds, all show that Congress intended the titles to operate separately.

Even more significant is the fact that the appropriations under Title III, even if considered as allocable against the proceeds of the tax, form only a part of the amount which Congress expects to collect. See p. 123, *supra.* Surely, it is unlikely that Congress would have wished to have an important revenue statute fall merely because an authorization of appropriations of a much smaller sum might be invalid. Compare *Field* v. *Clark,* 143 U. S. 649; *National Life Ins. Co.* v. *United States,* 277 U. S. 508; *Huntington* v. *Worthen,* 120 U. S. 97; *Brazee* v. *Michigan,* 241 U. S. 340; *Utah Light & Power Co.* v. *Pfost,* 286 U. S. 165, 185.

Indeed, petitioner's own argument proves that Congress intended that Title IX should stand even though Title III should be stricken down. It argues that the Congressional policy in passing the Act was, through the allowance of the credits, to make it possible for the States to pass unemployment compensation laws. We have already shown that the presence of this policy in framing the credits under a revenue act does not render it invalid but, in any event, it is apparent that the policy was to be achieved by means of the tax and credit rather than by the relatively small appropriations under Title III. At least, it cannot be assumed that Congress intended that an important revenue statute so framed as to achieve this policy should fall merely because the relatively unimportant authorized appropriations under Title III were beyond its power.

Moreover, the language of Section 303 (a), authorizing grants to States with unemployment compensation laws "approved under Title IX" which *in addition* meet the requirements of Section 303 (a) indicates clearly a Congressional intent to regard Title III as cumulative, rather than as an integral part of Title IX. Compare *Liggett Co.* v. *Lee,* 288 U. S. 517, in which the Court separated and sustained the basic tax despite the fact that a provision for increasing it in a particular situation was unconstitutional. See also *Sonzinsky* v. *United States, supra.*

We submit, therefore, that both in fact and in law Title III is independent of Title IX, and that its validity need not be adjudged in the present case.

B. Title III is, in any event, a valid exercise of the spending power of Congress.

Assuming, however, that the taxpayer is in a position to question Title III, we submit that there can be no constitutional objection to grants by the Federal Government to the States "for the purpose of assisting the States in the administration of their unemployment compensation laws", nor to the levy of a tax for the purpose of raising the necessary revenue.

Article I, Section 8 of the Constitution empowers Congress—

> * * * to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; * * *.

In this clause is found both the express power to tax in order to provide for the general welfare, and the implied, correlative power to spend in order to provide for the general welfare. Of course, if Congress may tax for this purpose it must have the power to appropriate the money which is raised to the same object. *United States* v. *Butler*, 297 U. S. 1, 65–67; *United States* v. *Realty Co.*, 163 U. S. 427, 440; *Legal Tender Case*, 110 U. S. 421, 440.

Public money, then, may be appropriated to the "general welfare". That term, though a limitation on the taxing and spending powers, is not itself limited by the subsequently enumerated powers, but includes anything that by any "reasonable possibility" will conduce to the national welfare. The determination of what is for the general welfare is primarily for Congress; the courts will not substitute their judgment unless "*by no reasonable possibility*" can the challenged legislation fall within "the wide range of discretion" possessed by Congress. *United States* v. *Butler,* 297 U. S. 1, 67.

We submit (1) that the maintenance by the States of unemployment compensation laws will, by some reasonable possibility, conduce to the general welfare; (2) that the form of the present appropriation—conditional grants-in-aid to the States to pay administrative expenses under State laws—is entirely valid; (3) that if the grants are valid, Congress was empowered to levy taxes in order to raise the necessary revenue; and (4) that the title is not rendered invalid by any improper delegation of power to the Social Security Board.

1. The maintenance by the States of unemployment compensation laws will promote the general welfare of the United States

It is clear from the economic data already presented (pp. 9–29, *supra*) that the adoption by the States of unemployment compensation systems will certainly by some "reasonable possibility" conduce to the national welfare. Such systems will go far toward alleviating the evils of unemployment and preventing the full effect of cyclical depression periods. They will relieve intolerable hardships to many millions of workers and their families. They will provide a sufficient safeguard for most of the unemployment that will occur in normal times. They will aid in the prevention of pauperism, with its concomitants of crime and vice. They will aid in the promotion of the general health, well-being and morality of the worker and will help to preserve his skill and efficiency. They will help to preserve peace and good order and avoid unrest. They will help to maintain purchasing power and avoid further unemployment and economic collapse. They will very materially lessen the federal relief burden in periods of depression. Since such state systems will promote the national welfare, it follows that the Federal government may cooperate with the States in the establishment and maintenance of these laws, by making money grants to assist them in administration expenses.

2. The form of the present appropriation—conditional grants-in-aid to the States to pay administrative expenses under State laws—is valid

The system of Federal grants of money or property to the States is one which has been exercised from the beginnings of the Government as an appropriate method by which the general welfare of the United States may be advanced by the exercise of Federal powers in cooperation with those of the States. Cf. *Hoke* v. *United States,* 227 U. S. 308, 322. Although the device was used infrequently by the early Congresses, its validity was never doubted, and during the last century it has become common in connection with a wide variety of matters.[18]

The practice apparently began with the Assumption Act (c. 34, 1 Stat. 138, 142) passed on August 4, 1790, by the first Congress, under which the Federal Government assumed the debts of the States incurred during the Revolution. The Act was sponsored by Alexander Hamilton. American State Papers, Finance, Vol. I, pp. 15–25. In 1803 Congress passed the first of a series of acts granting to each new State, upon its admission to the Union, certain lands for the use of the schools. Act of March 3, 1803, c. 21, 2 Stat. 225. In 1808 Congress appropriated $200,000 for the army and for equipping the state militia. Act of April 23, 1808, c. 55, 2 Stat. 490. See also Act of April 29, 1816, c. 135, 3 Stat. 320. In 1820, Congress passed the first of a long series of acts by which Congress appropriated to various states 5 percent of the proceeds of the sale of public lands within their borders, for the purposes of education, road construction or improvements. Act of March 6, 1820, c. 22, 3 Stat. 545, 547. See also, *e. g.,* Act of March 3, 1845, c. 75, 5 Stat. 788; Act of March 21, 1864, c. 36, 13 Stat.

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[18] See A. F. MacDonald, *Federal Aid* (1928); *Digest of Legislation Providing Federal Subsidies for Education,* U. S. Dept. of Interior, Off. of Education, Bulletin No. 8, (1930).

30, 32. In 1836 Congress provided that the surplus in the Treasury in excess of $5,000,000 should be deposited with the States, subject to their individual assent, under an agreement to repay upon a stated notice by the Secretary of the Treasury. Act of June 23, 1836, c. 115, 5 Stat. 52, 55. In 1841 Congress provided that the net proceeds of the sales of public lands should be divided among certain States, and that 500,000 acres of public land should be donated to each of nine specified States, and a similar amount to each new State, for purposes of internal improvement. Act of September 4, 1841, c. 16, 5 Stat. 453, 455.

The foregoing list is not intended to be exhaustive. Nor would it serve any purpose to set out in detail the vastly greater number of conditional grants which Congress has made to the States during the last century, to aid and encourage them in performing some function deemed by Congress to be conducive to the general welfare. A list of other acts of Congress providing for cooperation with the States is included in the Appendix to the Brief for the respondent Administrator in No. 32, *Duke Power Co.* v. *Greenwood County,* at pp. 90–98. Here it will be sufficient merely to refer to the larger categories.

The federal land grants, which began in 1803 (*supra,* p. 131), have been very extensive. Every State except the 13 original States and 5 others has received federal land grants for common schools, a total of 77,510,737 acres.[19] Grants for normal schools and universities have aggregated 3,987,954 acres.[20] Every State has a land grant college.[21] See *Hamilton* v. *Regents,* 293 U. S. 245, 259. And many millions of acres have been given to the States for public buildings, roads, and other internal improvements.[22]

Aside from the land grants, large sums of money have been granted to the States for various purposes. In 1930 educational institutions in the States had received, since the second Morrill Act in 1890,[23] an aggregate of $318,138,727.65.[24] Numerous grants have been made for highway purposes, the expenditure of the Federal Government being limited to 50 percent of the estimated cost of the approved projects.[25]

Assistance in agriculture has been given by Federal grants, for example, to match state funds for the suppression of the boll-weevil, the European corn-borer, and various cattle diseases.[26] Innumerable similar examples could be given in the fields of forest fire prevention,[27] vocational rehabilitation,[28] state militia,[29] and health and hygiene.[30]

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[19] *Digest of Legislation, supra,* pp. 3-4, 15.

[20] *Id.*, p. 23.

[21] Act of July 2, 1862, c. 130, 12 Stat. 503; Act of July 23, 1866, c. 209, 14 Stat. 208.

[22] See MacDonald, *supra,* p. 14. See also, *e. g.*, Act of Sept. 20, 1850, c. 61, 9 Stat. 466; Act of May 15, 1856, c. 28, 11 Stat. 9; Act of August 18, 1894, c. 301, 28 Stat. 372, 422 (grant of desert areas on condition that they be reclaimed); Act of March 1, 1911, c. 186, 36 Stat. 961, 963 (grant of 5 percent of national forest revenues); Act of February 25, 1920, c. 85, 41 Stat. 437, 450 (grant of 37½ percent of receipts from oil lands and water power licenses).

[23] Act of August 30, 1890, c. 841, 26 Stat. 417.

[24] *Digest of Legislation, supra.*

[25] See, *e. g.*, Act of July 11, 1916, c. 241, 39 Stat. 355; Act of February 12, 1925, c. 219, 43 Stat. 889.

This long-continued and well-established course of legislation is very persuasive evidence that the conditional grants here involved are an appropriate exercise by Congress of its spending power. *McCulloch* v. *Maryland,* 4 Wheat. 316, 401. The similar historical basis of a different exercise of legislative authority was evaluated by this Court in *United States* v. *Curtiss-Wright Export Corp.*, No. 98, December 21, 1936:

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[26] See, *e. g.*, Joint Res. of May 21, 1928, c. 665, 45 Stat. 688 (boll weevil); Act of February 6, 1931, c. 111, 46 Stat. 1064, 1067 (same); Act of February 9, 1927, c. 90, 44 Stat. 1065 (corn borer); Act of August 11, 1916, c. 313, 39 Stat. 446, 492 (cattle diseases).

[27] See, *e. g.*, Act of March 1, 1911, c. 186, 36 Stat. 961; Act of March 3, 1921, c. 127, 41 Stat. 1315, 1344; Act of June 7, 1924, c. 348, 43 Stat. 653. Thirty-three States have accepted benefits under the 1924 Act. MacDonald, *supra*, p. 43.

[28] Since 1920, Congress has appropriated annually $1,000,000 for this purpose, on condition that the States expend equal sums and meet certain requirements. Act of June 2, 1920, c. 219, 41 Stat. 735, 736, as amended by Act of June 5, 1924, c. 265, 43 Stat. 430, 431, and Act of June 30, 1932, c. 324, 47 Stat. 448, 449.

[29] See p. 131, *supra*. See also Act of January 21, 1903, c. 196, 32 Stat. 775; Act of June 3, 1916, c. 134, 39 Stat. 166, 215.

[30] See, *e. g.*, Act of November 23, 1921, c. 135, 42 Stat. 224; Act of July 9, 1918, c. 143, 40 Stat. 845, 886.

> A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined.

See also *Hampton & Co.* v. *United States,* 276 U. S. 394, 412; *Myers* v. *United States,* 272 U. S. 52, 175; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 352; *Stuart* v. *Laird,* 1 Cranch 299, 309. Indeed, the practice of Congress in making such grants has been recognized in a number of cases, and it has never been suggested or supposed that they were beyond the power of Congress. See, *e. g., Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 417; *Hamilton* v. *Regents,* 293 U. S. 245, 258–260; *Ervien* v. *United States,* 251 U. S. 41, 48; *United States* v. *Gratiot,* 14 Pet. 526.

The same answer may be given to the possible argument that Congress may not attach even such conditions to a grant as insure that it will be expended in accordance with its purpose. The requirements under Section 303 (a) are, in substance, the same as the provisions of Section 903 which, as we have shown (pp. 71–77, *supra*) are not regulatory, but merely insure that the credits will be allowed only for the administration of a genuine state unemployment compensation law.

The conditions do not differ in substance from those of many previous grants by Congress to the States. Many of them specify in detail the uses to be made of the money, require the States to meet certain Federal requirements, and provide for same degree of Federal supervision to insure that the money is spent in accordance with the terms of the grant.[31] Reasonable conditions of this sort do not amount to regulation. *United States* v. *Butler,* 297 U. S. 1, 73.

3. Since Congress was empowered to make the grants under Title III, it necessarily was empowered to levy taxes in order to raise the necessary revenue

Petitioner may argue that even if the grants are valid, nevertheless Congress could not lay a tax for the purpose of raising funds to make the grants because a tax laid to raise funds for a particular purpose, and not for general revenue only, is not a tax at all. It should be noted that the contention is not open to petitioner unless it can succeed in establishing not only that Titles III and IX are inseparable, but also that the funds raised by the tax levied under Title IX are in some fashion directly connected with the subventions under Title III (see pp. 121–127, *supra*). Even assuming, however, that petitioner can succeed in proving that the funds levied under Title IX are, in effect, "earmarked" for appropriation under Title III, we submit that the tax is not made invalid thereby.

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[31] See, *e. g.*, Act of September 4, 1841, c. 16, 5 Stat. 453, 455, Sec. 9; Act of July 2, 1862, c. 130, 12 Stat. 503; Act of August 30, 1890, c. 841, 26 Stat. 417; Act of January 21, 1903, c. 196, 32 Stat. 775; Act of February 23, 1917, c. 114, 39 Stat. 929; Act of November 23, 1921, c. 135, 42 Stat. 224; Act of February 9, 1927, c. 90, 44 Stat. 1065.

Taxes are, of course, levied "for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare." *United States* v. *Butler,* 297 U. S. 1, 64. Ordinarily, there is no indication in the act laying the tax of the particular purpose for which the funds are to be used, but it seems apparent that there is nothing unnatural or improper in relating specific anticipated government expenditures to specific revenues.[32] Some proponents of budgetary reform, knowing that earmarked taxes educate the taxpayer and act as a restraint on profligacy, believe that the connection should be made obligatory, as it is under the constitutions of several of the States (e. g., New York Constitution, Article III, Sec. 24; Michigan Constitution, Article X, Section 6). The fact that the Federal Constitution specifically requires that taxes be for the purpose of paying the debts or providing for the common defense and general welfare (Article I, Sec. 8) assumes the propriety of including in a taxing statute the purpose for which it is laid, providing, of course, that the purpose be a proper object of governmental expenditure.

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[32] See *Report of the Select Committee on the Budget*, H. Rep. No. 14, 67th Cong., 1st Sess.

Taxes for some particular purpose were common in England before the Constitution was adopted.[33] They are common in all the States, for purposes such as schools, roads and the like. Nor is it any new departure for Congress, by the act levying the tax, to earmark or even to appropriate the proceeds to a particular purpose. For example, in the Act of March 3, 1791, c. 15, 1 Stat. 199, 213–214, a tax was levied on spirits, and the proceeds were pledged and appropriated for the payment of interest on loans and the payment of the public debt. Again, in the Act of March 26, 1804, c. 46, 2 Stat. 291, tariffs were increased, the proceeds of the increase to be used for the sole purpose of carrying on a war against the Barbary powers. Since 1902 money for the support of the Philippine Islands has been raised by customs duties and internal revenue taxes in this country, the proceeds of which have often been earmarked for the Philippine Treasury. See, *e. g.,* Act of March 8, 1902, c. 140, 32 Stat. 54, Sec. 4; Act of June 17, 1930, c. 497, 46 Stat. 590, 686.[34]

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[33] See Holdsworth, *History of the English Law,* Vol. 6, p. 253; Blackstone, *Commentaries,* Vol. 1, p. 330 *et seq.;* Seligman, *Essays on Taxation* (1895 ed.) pp. 345–349.

[34] See also, *e. g.,* Act of May 8, 1792, c. 32, 1 Stat. 267, 270; Act of March 3, 1797, c. 10, 1 Stat. 503; Act of May 13, 1800, c. 66, 2 Stat. 84; Act of December 21, 1814, c. 15, 3 Stat. 152; Act of March 3, 1917, c. 159, 39 Stat. 1000; Act of April 23, 1924, c. 131, 43 Stat. 106. See also Brief for the United States in No. 659, *Cincinnati Soap Co.* v. *United States,* pp. 28–35.

Again we submit that the well-established practice of Congress cannot now be held to be unconstitutional. See p. 134, *supra; United States* v. *Curtiss-Wright Export Corp., supra*. Indeed, this Court has recognized that the relationship assumed to be present here between tax and expenditure is a normal and necessary incident of the legislative function. *Knights* v. *Jackson,* 260 U. S. 12, 15; *Patton* v. *Brady,* 184 U. S. 608, 620. See also *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 71; *Nashville C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, 268; *Milheim* v. *Moffatt Tunnel District,* 262 U. S. 710, 719; *Green* v. *Frazier,* 253 U. S. 233; *Olcott* v. *The Supervisors,* 16 Wall. 678, 695, 696.

Neither the *Head Money Cases,* 112 U. S. 580, nor *United States* v. *Butler,* 297 U. S. 1, ~~are~~ is to the contrary. In the former the Court suggested that the specification of limited purposes of the levy was some indication that the legislation was not meant to be a tax. Since in the usual case revenue measures are for general rather than limited purposes this was probably relevant as *some* indication of the Congressional purpose. The opinion in no way indicated that such a specification would invalidate a statute which was clearly an exercise of the taxing power; on the contrary, it expressly stated that, as a tax statute "it would not be difficult to show" that the levy it authorized was "made for the general welfare" (112 U. S. at 595). In the *Butler* case the vice in the statute was not the appropriation of the proceeds *per se*, but the appropriation to an unconstitutional purpose. Here, as we have shown, the purpose is clearly valid.

We submit, therefore, that even if the tax levied by Title IX be considered as laid for the purpose of making the subventions under Title III, the tax is nonetheless valid.

4. Title III contains no unconstitutional delegation of legislative power

The taxpayer urges that wholly apart from the foregoing considerations, Title III should be declared to be unconstitutional as an improper delegation of legislative power to the Social Security Board. The contention is based upon the provision of Section 302 (a), which provides:

> The Board shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the Board under Title IX, such amounts as the Board determines to be necessary for the proper administration of such law during the fiscal year in which such payment is to be made. The Board's determination shall be based on (1) the population of the State; (2) an estimate of the number of persons covered by the State law and the cost of proper administration of such law; and (3) such other factors as the Board finds relevant. The Board shall not certify for payment under this section in any fiscal year a

> total amount in excess of the amount appropriated therefor for such fiscal year.

We submit that the contention is wholly without merit (1) because the Constitution does not require Congress to specify in detail the manner in which public money is to be expended, and, alternatively, (2) Section 302 (a) provides standards adequate to guide the Board.

A. The Constitution Does Not Require Congress to Specify in Detail the Manner in Which Public Money Is to Be Expended[85]

Article I, Section 9, Clause 7 of the Constitution provides:

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

This clause, phrased as a restriction on the power of expenditure, contains implicit recognition of the fact that the power is entrusted to the Executive. *Collins* v. *United States,* 15 Ct. Cl. 22, 35; *Compagna* v. *United States,* 26 Ct. Cl. 316, 317. The Constitution contains no requirement concerning the detail with which acts of appropriation shall specify the manner in which expenditures are to be made. That question the Constitution leaves in the discretion of Congress.

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[85] This argument is fully developed in the Brief for the respondent Administrator in No. 32, *Duke Power Co.* v. *Greenwood County*, October Term, 1936, at pp. 120–160, to which the Court is respectfully referred.

Congress may, of course, prescribe in the most minute detail both the objects to which funds shall be applied and the manner in which the expenditure shall be made. Correlatively, however, Congress may state in general terms the purposes for which money is appropriated and leave to the executive the determination of the details of the expenditure. The question is not one of power, but of policy. Not only the language of the Constitution, but also the historic practice, which was adopted by the Framers, and the practice of Congress since the adoption of the Constitution, make this clear.

The members of the Constitutional Convention plainly intended the function of appropriation to be the equivalent of that found in the English constitution,[38] which may thus be referred to in order to determine the dividing line between the legislative function of appropriation and the executive function of expenditure. *Ex parte Grossman,* 267 U. S. 87, 108–111; *Myers* v. *United States,* 272 U. S. 52, 118. The first grant to the King by Parliament appears to have been made in 1275. See Stubbs, *Constitutional History,* Vol. II, p. 523. Sporadically, for centuries, such grants continued. Stubbs, *supra,* pp. 565–568. The important point is that the Parliamentary appropriation was not a grant of money for a narrowly specified purpose, but merely a legislative assent that the Crown should spend the proceeds of the tax in question for some broad purpose.

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[38] See statements by Madison (Formation of the United States, Documents Illustrative of the Formation of the Union of the American States, H. Doc. No. 398, 69th Cong., 1st Sess., p. 323); Wilson (*id.*, p. 337); Dickinson (*id.*, p. 533); and Rutledge (*id.*, pp. 534–535). See also Miller, *Constitutional Law*, pp. 205–209; Wilson, *Jurisprudence and Political Science* (1896 ed.), Vol. II, 42–44.

In 1698 there was the beginning of the "civil list." 9 & 10 Wm. III, c. 23, Sec. 14. Maitland, *Constitutional History of England,* p. 435. But not until the Civil List Act of 1782 (22 Geo. III, c. 82) passed five years before the Constitution was formed, did Parliament exercise any important supervision over ordinary civil expenditures (Maitland, *supra,* p. 436), and even that control was very limited. In some situations Parliament at that time exercised rather detailed supervision;[37] in some it attempted little or none at all beyond a broad statement of the purpose of the tax.[38] The legislative branch thus possessed a flexible limitation upon executive expenditures. Not until long after the adoption of the Constitution did more particularized appropriations become common in England.

The legislation and authoritative discussion in the years immediately following the adoption of the Constitution also bear out the concept of a discretionary legislative function of appropriation which is as fully performed by a broad appropriation as by one which is detailed in character. The first appropriation act (Act of August 7, 1789, c. 9, 1 Stat. 53) appropriated an unspecified sum for the "necessary support, maintenance and repairs of all lighthouses, beacons, buoys and public piers" theretofore erected. The first general appropriation act (Act of September 29, 1789, c. 23, 1 Stat. 95) was almost wholly devoid of details as to expenditures. It is unnecessary to multiply examples[39] to make it plain that the members of this Congress, composed largely of members of the constitutional or ratifying conventions, did not understand the Constitution to require any degree of particularity in appropriation acts. Subsequent Congresses have continued the practice of appropriating money in terms which have varied widely between the minute and the exceedingly broad.[40]

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[37] See, *e. g.,* Statutes at Large, 27 Geo. III, c. 33.

[38] See, *e. g.,* 20 Geo. III, c. 42, Sec. 3; Session Laws, 31 Geo. II, pp. 11, 15.

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[39] See also Act of March 26, 1790, c. 4, 1 Stat. 104; Act of July 1, 1790, c. 22, 1 Stat. 128; Act of July 20, 1790, c. 30, 1 Stat. 135; Act of August 4, 1790, c. 34, 1 Stat. 138; Act of March 3, 1791, c. 28, 1 Stat. 222, 224.

[40] Acts which contain very broad appropriations include those of June 14, 1809, c. 2, 2 Stat. 547; Act of August 10, 1846, c. 175, 9 Stat. 85, 96; Act of July 31, 1861, c. 28, 12 Stat. 283; Act of April 3, 1874, c. 75, 18 Stat. 26; Act of March 24, 1900, c. 91, 31 Stat. 51; Joint Resolution of May 9, 1912, No. 19, 37 Stat. 633, 634; Act of February 25, 1927, c. 202, 44 Stat. 1244. A much more extended list is contained in the Appendix to the Brief for the respondent Administrator in No. 32, *Duke Power Co.* v. *Greenwood County*, at pp. 68–89.

The early commentators likewise appeared to have viewed the power of appropriation as a discretionary check upon the executive. See Hamilton, *The Federalist*, No. 72 (Lodge ed.) p. 72; *Works* (Ham. ed.), Vol. VII, pp. 532, 533. Gallatin, *Writings* (Adams ed.) Vol. III, pp. 73, 117. As a matter of *policy*, not of power, Jefferson and Hamilton disagreed on the practice of lump sum appropriations.[41] The former seems to have prevailed, for beginning with his administration, the appropriation acts became more detailed.[42] However, again as a matter of policy, excessive detail in appropriation has been criticised as tending toward, instead of away from, irresponsibility in administration.[43]

The argument does not, however, rest upon history alone, for there is in addition sound basis for it in reason—the basic distinction between powers which are coercive or regulatory, and those which are not. To apply the prohibition against delegation of power rigidly, without regard to the nature of the power exercised, would lead to grave and novel consequences. For example, Congress has granted broad powers in the administration of public lands or property (*Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126; *United States* v. *Chemical Foundation,* 272 U. S. 1, 12), the administration of the territories (*United States* v. *Heinszen & Co.,* 206 U. S. 370, 385), or the disposal of the property of the United States (*Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288). The same is true with respect to the power of Congress to establish fiscal agencies (*McCulloch* v. *Maryland,* 4 Wheat. 316, 335–337 (argument of counsel), 424; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180, or to borrow money on the credit of the United States (See U. S. C., Title 31, Sections 752–757). Cf. *United States* v. *Curtiss-Wright Export Corp.,* No. 98, December 21, 1936.

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[41] See Jefferson, in Richardson, *Messages and Papers of the Presidents*, Vol. 1, p. 329; Hamilton, in *Works* (Ham. ed.) Vol. VII, p. 788.

[42] See, *e. g.*, Acts of May 9 and 14, 1836, c. 59–62, 5 Stat. 17–31.

[43] *Report of Committee on Economy and Efficiency*, H. Doc. No. 854, 62d Cong., 2d Sess.

The thorough separation of governmental powers into three departments was regarded by the framers and those upon whom they relied as the basic safeguard against tyranny or oppression by one official or body.[44] Unless coercion or regulation of individuals or private rights is involved, legislative delegation presents no danger of the results which the Framers feared.

Moreover, the decisions of both state and lower Federal courts have recognized that decision as to the details of an expenditure is not a legislative function. In *People* v. *Tremaine,* 252 N. Y. 27, the court said (pp. 44, 45):

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[44] See Gouveneur Morris (Formation of the Union, supra, p. 393); Madison (*id.*, p. 397–398); Wilson (*id.*, pp. 846, 947); Federalist, No. 47; Montesquieu, *Esprit des Lois*, Bk. II, c. 6. See also *Myers* v. *United States*, 272 U. S. 52, 116.

> The head of the department does not legislate when he segregates a lump sum appropriation. The legislation is complete when the appropriation is made. * * * The legislative power appropriates money and, except as to legislative and judicial appropriations, the administrative or executive power spends the money appropriated.

See also *United States* v. *Hanson,* 167 Fed. 881 (C. C. A. 9th); *Kansas Gas & Electric Co.* v. *City of Independence,* 79 F. (2d) 32 (C. C. A. 10th); *Greenwood County* v. *Duke Power Co.,* 81 F. (2d) 986 (C. C. A. 4th), rev'd on other grounds, No. 32, October Term, 1936, December 14, 1936; *State ex rel. Bonsteel* v. *Allen,* 83 Fla. 214; *Abbott* v. *Commissioners,* 160 Ga. 657; *Edwards* v. *Childer,* 102 Okla. 158; *Holmes* v. *Olcott,* 96 Ore. 33; *Moers* v. *City of Reading,* 21 Pa. 188, 202; *Chicago & N. W. R. Co.* v. *State,* 128 Wis. 553; *State* v. *Zimmerman,* 183 Wis. 132; *State* v. *Clausen,* 94 Wash. 166.[45]

Every source of authority, therefore, supports the view that the legislative function is fully performed when Congress grants money, designating the purpose and limit of its use. We submit, therefore, that there is no question of delegation raised by Section 302 (a) of the Act.

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[45] A contrary result was reached in *Franklin Township* v. *Tugwell,* 85 F. (2d) 208 (App. D. C.). The argument here made was not presented to or considered by the court. Cf. *Webster* v. *Fall,* 266 U. S. 507, 511.

B. IN ANY EVENT, TITLE III PROVIDES STANDARDS ADEQUATE TO GUIDE THE BOARD IN THE EXPENDITURE OF THE MONEY APPROPRIATED

However, even if the standards of delegation of powers applicable to regulatory or coercive laws be applied, nevertheless there is, we submit, no improper delegation of power by Section 302 (a). The section supplies a primary standard—the amount which "the Board determines to be necessary for the proper administration of such law during the fiscal year." That standard is, in turn, further defined and limited by the specification of four other factors which the Board is required to take into consideration: (1) the population of the State; (2) an estimate of the number of people covered by the state law; (3) the total for all States must not exceed the appropriated amount; (4) such other factors as the Board finds relevant.

The case of *Hampton & Co.* v. *United States,* 276 U. S. 394, presents a very similar situation. The Tariff Act of 1922, Section 315, provided a primary standard, with several specific factors which the President was required to take into consideration. The fourth factor there—"any other advantages or disadvantages in competition"—is very similar to the fourth factor mentioned above. In each case the clause is to be read with an eye to the *eiusdem generis* maxim. Section 302 (a) seems clearly within the *Hampton* decision. See also *Field* v. *Clark,* 143 U. S. 649, 692. Congress has legislated as far as is reasonably practicable, and has made clear the policy. *Buttfield* v. *Stran-*

ahan, 192 U. S. 470, 496; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 27. Beyond that it is not required to go.

CONCLUSION

Wherefore, we submit that Title IX of the Act should be declared constitutional in every respect, and that the decision of the court below denying the taxpayer's claim for the recovery of taxes paid should be affirmed.

✓ HOMER CUMMINGS,
Attorney General.
✓ STANLEY REED,
Solicitor General.
✓ ROBERT H. JACKSON,
Assistant Attorney General.
CHARLES E. WYZANSKI, JR.,
✓ SEWALL KEY,
✓ A. H. FELLER,
✓ J. P. JACKSON,
✓ ARNOLD RAUM,
✓ F. A. LESOURD,
Special Assistants to the Attorney General.
CHARLES A. HORSKY,
Attorney.

THOMAS H. ELIOT,
General Counsel,
✓ ALANSON WILLCOX,
Assistant General Counsel,
Social Security Board.

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